

1 THE SECRETARY OF EDUCATION'S COMMISSION ON
2 OPPORTUNITY IN ATHLETICS
3 PHILADELPHIA FULL BUSINESS MEETING
4 MARRIOTT PHILADELPHIA
5 1201 MARKET STREET
6 FIFTH FLOOR - SALONS A & B
7 PHILADELPHIA, PA 19107
8 (215) 625-2800
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11 TRANSCRIPT OF PROCEEDINGS
12 DECEMBER 4, 2002
13 9:00 o'clock a.m.
14 WEDNESDAY
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24 REPORTED BY: LORI ANN ASASKAS, CSR, RPR.

L.A. REPORTING (312) 419-9292

1 MS. COOPER: Would the commissioners
2 please come forward. We're ready to get started
3 just as soon as the commissioners can take their
4 seats and get ready. Let's do that now, please.

5 Good morning. Welcome today
6 to our Philadelphia meeting. I am Cynthia Cooper
7 along with Ted Leland. I serve as co-chair of
8 the Commission.

9 We have a very busy day ahead
10 of us. This morning, we will begin to develop
11 our recommendations.

12 This morning we will also hear
13 from Secretary Rod Paige, who will join us shortly.
14 When he arrives, the secretary will sit with us
15 and listen to our deliberations. Then, following
16 the break, he will make remarks to the Commission
17 and he will not be accepting questions if I'm
18 correct. He is just observing. He is here to
19 observe and he will make his remarks after we
20 come back from the break.

21 Before we begin, let me
22 outline the process we will use today to develop
23 our recommendations. Our process will be a bit
24 different than yesterday. Ted and I decided to

1 revise the process in order to ensure that all
2 commissioners, including those who have to leave
3 early, have an opportunity to present their
4 recommendations.

5 Our process will be this:
6 Starting with the co-chairs, each commissioner
7 will present their top recommendation. Starting
8 with the co-chairs, each commissioner will
9 present their top recommendation.

10 The commissioners will discuss
11 each recommendation. We will try to determine
12 whether the recommendation has the support of
13 the Commission and if so, we will bring the
14 recommendation to our January meeting in Washington
15 to vote on it there.

16 We will -- after we have gone
17 around the table once, we will repeat the process.
18 Each commissioner will be asked to present another
19 recommendation and there is a soft time limit of
20 about five minutes. So we just want to be mindful
21 of that, that there was a soft time limit, and
22 then we will then move on to the next
23 recommendation.

24 We should be mindful that each

1 recommendation should address the seven questions
2 in our charter. Just be mindful that I know there
3 is a lot of crossover and there's -- you know, in
4 indirect ways, they will address the seven
5 questions, but we just kind of want to keep in
6 mind that we are to make recommendations on the
7 seven questions.

8 At this point, I want to open
9 it up for any questions from the commissioners
10 on anything that I have said.

11 MS. GROTH: Cynthia, yesterday
12 towards the end of the meeting, it was clear
13 that many of us weren't very clear on the
14 three-prong test. We dug through our cases
15 and tried to find a copy and had many questions.
16 I'm wondering if it wouldn't be appropriate,
17 and I made copies for everybody on the three
18 prongs, since we are going to be potentially
19 making recommendations on a 30-year old law,
20 that perhaps we should take some time this morning
21 and talk a little bit and review the three-part test
22 so that we all understand it.

23 I don't know if that should
24 come from the OCR staff, who can walk us through

1 with the examples or not. I don't know if you
2 felt like I did yesterday, but I walked out of
3 here and thought we didn't have the appropriate
4 material and then, furthermore, we were all a
5 little bit confused. We didn't know if it was
6 one percent, five percent, if there were examples
7 or if there weren't examples. So if that's okay
8 with you, maybe we could do that.

9 MS. COOPER: We have five minutes.
10 Jerry, why don't you start?

11 MR. REYNOLDS: Okay.

12 MS. COOPER: And speak into the mic.

13 MR. REYNOLDS: Yes. I remember your
14 order from the order yesterday.

15 Okay. I guess this is a good
16 opportunity to announce that Julie was right
17 yesterday. We were discussing the issue -- I
18 started discussing variance, whether there was
19 such an animal.

20 In a practical -- in the
21 day-to-day activities of OCR, there is a rule
22 of thumb basically, the lower the better, but
23 a little reading of the example to include it
24 in the three-part test leads me to conclude

1 that there isn't a percentage variance.

2 Basically, we start off with
3 what the -- the goal is to hit the number, to
4 match up the participation opportunities with
5 the enrollment rate and if there is a variance,
6 to find out whether a school is in compliance,
7 you just count the number of students.

8 Basically, if it's three
9 percent, if you have a program of, say, 600
10 athletes and 300 are women and there is a two
11 percent variance, you just do the multiplication
12 and if there is enough students, enough students
13 who have an interest and ability and if there
14 are -- if there is competition in that area,
15 then, you will be held to be out of compliance.

16 Anyway, I think that after
17 getting away from that, I think that it will
18 be helpful if people would ask questions and
19 I will do the best I can to answer questions.
20 Is there anything specific on the minds of
21 commissioners?

22 MS. COOPER: So there is a --

23 MR. BATES: Yes.

24 MS. COOPER: Go ahead.

1 MR. BATES: I'm sorry. I just
2 want to know when we talk about proportionality
3 and scholarships, what are the percentages that
4 we are -- that we're talking about with the
5 variance?

6 MR. REYNOLDS: With respect to
7 scholarships, it's -- you are presumed to be
8 in compliance if the variance is one percent
9 or less. That's with respect to scholarships.
10 That's not the case in determining compliance
11 outside of that framework.

12 MR. LELAND: That's one percent
13 variance scholarship ratio versus participation
14 of athlete ratio, not student body ratio, is
15 that correct?

16 MR. REYNOLDS: That's correct.

17 MR. LELAND: Okay. Let me just
18 make a comment. I talked to Cary a little bit
19 before this. I didn't feel embarrassed by the
20 fact that we didn't know exactly the formula
21 requirements for proportionality because to me,
22 it was confirming the issue of the confusion.
23 There is confusion.

24 We -- I think some of the

1 people represented here have some of the best
2 women's programs in the country and have worked
3 hard to comply with Title IX and spend every
4 day trying to -- as part of their day trying
5 to do that. So I think the fact that we were
6 confused is an example of the need for
7 clarification.

8 I want to expand it just a
9 little bit because of the -- if you get in our
10 situation, you get, you know, opinions from
11 sort of OCR documents. You get opinions sort
12 of word-of-mouth about OCR decisions in different
13 areas.

14 You get -- NCAA will give you
15 different opinions and somebody's certification
16 will give you different opinions. NCAA guides --
17 you get guides from the NCAA on how to meet Title
18 IX. You also go to seminars by Title IX. You
19 have on-campus Title IX committees. We have
20 consultants out there.

21 I mean, there are all of these
22 people sort of bombarding us with information and
23 in the end, nobody really knows -- not nobody,
24 but a lot of people who are actually making these

1 decisions don't know the day-to-day facts of the
2 case. So I think it just argues -- I didn't feel
3 embarrassed. I felt confirmed by the fact that we
4 were all confused.

5 MR. REYNOLDS: Well, Ted, you
6 raise a good point. I think that there has
7 been a vacuum. I think that OCR needs to do
8 a better job of getting out there and being
9 the official repository of knowledge.

10 We have a whole host of groups
11 out there talking about what the standard is and
12 so I can -- as I told one of the ADs here, I
13 appreciate the difficult job that ADs have in
14 terms of coming into compliance, but I think
15 that throughout the town hall meetings, people
16 have criticized the Office of Civil Rights and
17 some of the criticism is grounded, in fact.

18 I think that we have to do a
19 better job and hopefully, after we come up with
20 our recommendations, that those recommendations
21 could help guide the process.

22 The process is already
23 underway at OCR in terms of doing a better job
24 of articulating what the policy is and disseminating

1 information, but I hope that we get some additional
2 recommendations that we can use to alter our
3 practices.

4 MS. GROTH: Ted, because of all of
5 those reasons and all of those people that you
6 mentioned or groups that you mentioned with the
7 different interpretations or opinions about the
8 three-part test, that's why I thought perhaps it
9 would be best if we just walked through what it
10 is.

11 You know, what is -- what are
12 the interpretations through the 1996 letter so
13 that as we move forward this morning, we all are
14 starting from the same place because we do have
15 all of those opinions that have been given to
16 us over the years or whatever the case may be.

17 MS. COOPER: Cary, I don't think
18 we have time to walk through the document
19 piece-by-piece.

20 MR. SPANIER: We don't even have a
21 document.

22 MR. REYNOLDS: Well, we could -- I
23 agree, Cynthia, that if we want to analyze the
24 three-part test, then, we're talking a good chunk

1 of time here. Just with the first proportionality
2 prong, there are a whole host of issues lined up
3 with it. We can ask whether that is the appropriate
4 pool for substantial proportionality.

5 It says substantial
6 proportionality, but how it works in a practical
7 sense, is that closer to strict proportionality?
8 We can get -- we can have some great conversations
9 about this and we have. We have discussed a lot
10 of the issues.

11 I'm also concerned that we
12 haven't spent enough time talking about prong two.
13 One issue that concerns me is if a school has done
14 a bad job in the past of complying with Title IX,
15 should successor ADs be penalized for the
16 discriminatory conduct of ADs -- of previous ADs and
17 you have to show continuous progress. If
18 there is a gap, you have difficulty coming into
19 compliance with prong two.

20 MS. COOPER: Jerry --

21 MS. GROTH: Jerry, I think what --
22 oh, go ahead, Cynthia.

23 MS. COOPER: I just want to cut this
24 off because I think a lot of this conversation and

1 a lot of these points will be brought up within the
2 recommendations and the discussions that we will
3 have after our -- after each person's recommendation
4 is presented. So I just want to stop this right
5 here.

6 MR. SPANIER: Can I just say
7 something?

8 MS. COOPER: Yes, of course.

9 MR. SPANIER: I just want to say I
10 would like for us -- I want to make another pitch,
11 as I did a couple of times yesterday, for us to
12 take the big picture here into consideration.
13 Rather than focus on each individual recommendation
14 and hammer that to death, can we create some larger
15 vision of what we would like to see happen?

16 I think given all of the
17 testimony that we have heard and all the discussion
18 we had yesterday, we should be thinking about the
19 possibility of a new clarification letter. I think
20 what the new letter -- what such a new letter would
21 say if one were to be issued would be much more
22 important to talk about than what the different
23 opinions are about what an old letter said.

24 I asked the question yesterday,

1 at any time leading up to the 1979 determination
2 was there a discussion of other prongs or other
3 tests? I think that's an interesting question and
4 should there be.

5 Secondly, I think it should be --
6 it could be very important to explore not just here
7 are a few ways and you pick one and meet that test,
8 the world isn't that simple often. If a school were
9 30 percentage points off in their equity ratios, but
10 had added three years ago women's Equestrian, should
11 that now make them compliant? I'm not sure I would
12 buy that just because they have made some progress
13 recently. What were they doing the last 20 years?
14 Maybe they ought to be making a lot more progress
15 a lot more quickly.

16 I think -- I would suggest that
17 we talk about getting into a zone where you look
18 at a balance of demonstration that you are in
19 compliance. Maybe the question shouldn't be is
20 one or three or five percent the right difference.
21 One or three or five percent might have to do
22 with how you are doing on the other two prongs
23 or some other prongs that we haven't talked about.

24 Am I making any sense? I

1 think --

2 MS. COOPER: Yes, you are making
3 sense.

4 MR. SPANIER: -- that -- I just
5 hope we have that discussion because if we just
6 do each individual recommendation and somebody
7 says, well, let's change one percent to five
8 percent, let's clarify how -- what surveys of
9 interest and abilities would be, let's put a
10 time element on what it means to be making
11 progress towards equity. You have a sport --
12 you know, to give more specificity to that,
13 I'm not sure if that provides the right long-term
14 impetus for enhancing Opportunity in Athletics.

15 MS. COOPER: Okay. And we can --

16 MS. FUDY: Cynthia, can I just say
17 something real quick?

18 I agree, Graham, that, you know,
19 looking forward and looking at things that we can
20 help and big picture recommendations, but I also
21 think at the same time we have to be careful that,
22 you know, we don't repeat some of the same mistakes
23 by not knowing what the prior mistakes were, by
24 not understanding the issues.

1 It would be like the analogy of
2 if you're on the diving board and you're jumping
3 off and then you realize you don't know how to
4 swim when you are in the air. I think that we
5 just have to be careful that if we're going to
6 make changes, that we understand the implications
7 of such and understand what has come before us
8 because it's been around for 30 years and we can't
9 deny that history and just have an understanding
10 of that as well as looking forward because I would
11 hate to make some of the same mistakes again and
12 find ourselves having another Commission in, you
13 know, in six months.

14 MR. SPANIER: I agree with that
15 and I -- you know, my thinking is there is no
16 way this committee in a matter of a couple
17 weeks is going to be able to collectively write
18 a ten-page document, maybe the next one has to
19 be even longer, that clarifies everything.

20 I think part of what we need
21 to do is to -- I mean, it's not our authority
22 to do this, but give the staff or request the
23 secretary of education or the Office of Civil
24 Rights to give them a mandate or encouragement

1 to do a new letter that deals with all of the
2 things that we have been talking about and may
3 still yet talk about.

4 MR. LELAND: I think we -- we need
5 to -- we have sort of committed ourselves to a
6 process here. I think both what Julie is concerned
7 about and, Graham, what you are concerned about
8 and, Cary, can be formulated, and I challenge you
9 to formulate it in terms of what recommendations you
10 might make. They don't have to be a short-term
11 practical day-to-day recommendation of the change
12 in percentage or something, they could be more
13 global type of recommendations like Graham is
14 interested in.

15 The vehicle for you guys to
16 voice your concerns is sort of a recommendation
17 process. That's the way I think Cynthia and I
18 would like to go forward and then we will see
19 where we are in the end. I think there is --
20 I'm agreeing with everybody, yet at the same
21 time, we have a deadline. We didn't set the
22 deadline. The deadline was set for us. We
23 need to get on with the business.

24 I think we need to -- we

1 need to challenge you guys to figure out a way
2 to get your concerns down in the form of some
3 kind of a recommendation for government action
4 as opposed to us stopping the process right
5 now and spending all day discussing some of
6 these issues, which we have discussed a number
7 of times.

8 MR. BOWLSBY: Ted, when do we --
9 obviously, we can't adopt everybody's
10 recommendation. Some may be at odds with one
11 another. Some are just in a vacuum and are
12 not things we just would not like to adopt in
13 the majority. When do we discuss those?

14 MR. LELAND: Well, I think Cynthia
15 and my idea was today, we would go around, you
16 know, and based it sort of on where you are
17 sitting and try to be as fair to all the
18 commissioners as we can to ask for your
19 recommendations.

20 If there is some support
21 from other commissioners for your recommendations
22 as in, i.e., one or two other people, then, we'll
23 ask the staff to write that recommendation up and
24 then present it to us in front of -- before the

1 January meeting so we all have a chance to read
2 them and then the idea would be that we would
3 have a vote on those recommendations.

4 If they are conflicting or
5 whatever, we'll have to work that out as we
6 worked through the proposals. So my thought
7 was I would -- if I start out, Cynthia said
8 we're going to start it. If I start out, I'll
9 make a proposal, we'll discuss for five minutes,
10 and if there is any support for that, we'll --
11 and it can be a very practical one.

12 Change one percent to two
13 percent. It could be very global. We should
14 worry about the big issues. We should talk
15 about whether there are really three prongs
16 or should there be four of them? You can
17 handle your recommendations in any way.

18 If there is support for
19 that recommendation, the staff writes it up,
20 gets it to us, we discuss it when we get it
21 back in January. Hopefully, it is a
22 knowledgeable discussion. Then we go ahead
23 and vote it up or down.

24 That's the process we are

1 looking at. We have to -- if we are going
2 to have recommendations -- we don't have to
3 have recommendations, but we have to have
4 findings. We did that -- we got our draft,
5 we hope, done yesterday of that.

6 Now, today was the day
7 we had set aside for trying to go through
8 recommendations. I have a feeling people
9 want to recommend more practical or global
10 looks at this issue.

11 MS. COOPER: Okay. Is that
12 okay?

13 MR. LELAND: Yes.

14 MR. COOPER: I just want to make
15 sure that, Julie, I don't know if you were in
16 here when we discussed that we are going to go
17 around the table and we're going to -- we're
18 going to tell everyone, for lack of a better
19 phrase, our top recommendation. Did you hear
20 that part?

21 MS. FUDY: No.

22 MS. COOPER: All right.

23 MS. FUDY: No, I didn't. I'm
24 sorry.

1 MS. COOPER: Do you want me to go
2 back over it?

3 MS. FUDY: No. Tom would like
4 to hear it again too.

5 MR. COOPER: I just want to get --
6 Tom, you want to hear it again too?

7 MR. GRIFFITH: Yes.

8 MS. COOPER: I said before we begin,
9 let me outline our process. Our process would be
10 a bit different than yesterday. Ted and I decided
11 to revise the process in order to ensure that all
12 commissioners, including those who have to leave
13 early, have an opportunity to present their
14 recommendations. Starting with the co-chairs,
15 each commissioner will present their top
16 recommendation.

17 That's what was said. Okay?

18 MS. FUDY: Okay.

19 MS. COOPER: And then we will go
20 around and then we will go around a second time
21 and so on and so forth. Okay?

22 MR. GRIFFITH: I just want to
23 make -- this may sound like I'm nitpicking.
24 You said that yesterday, we came up with a draft

1 of the findings. I think I was saying several
2 times yesterday that's not what my understanding
3 of what yesterday was. I mean, there were a lot
4 of things that went by that I wouldn't want to
5 be in a first draft of the findings.

6 I thought what we were about
7 was people getting out on the table what their
8 proposed findings would be without us getting
9 into detailed discussions on each proposed
10 finding whether that would be, you know, part
11 of the drafts. I may be splitting hairs.

12 MR. LELAND: No, no. I agree,
13 Tom.

14 MR. GRIFFITH: Okay.

15 MR. LELAND: You are correct. I
16 stand corrected. Let's be very, very clear that
17 what comes out of yesterday's discussion is just
18 sort of a document that we're going to continue
19 to chew on, but it doesn't represent any kind of
20 consensus or any kind of position or any kind of
21 draft. I apologize for giving you the wrong
22 impression.

23 MR. COOPER: Do you want to start?
24 We need to get moving.

1 MR. LELAND: Yes. I'll start this.
2 I think we were going to try to keep each one
3 to -- oh, thank you. He's complimenting me,
4 thanking me for starting.

5 My first recommendation is
6 that the department -- the OCR consider an
7 alternative way of measuring participation
8 opportunities and that is instead of having a
9 definition of a participant or an opportunity
10 as a participant who is on the squad the first
11 day of competition, that we would have an
12 alternate way to do it.

13 I don't think this is in lieu
14 of. I think this is in addition to because many
15 people are -- have invested lots of money in
16 the old system of -- in the present system of
17 measuring student athlete participation and
18 basic proportionality formulas on the number
19 of student athletes the first day of competition
20 on the squad list.

21 I would like to see an
22 alternative way to do that, which would be to
23 set an arbitrary number for each particular
24 sport. For instance, soccer might be 20 for

1 men and 20 for women and you add up the number
2 of sports that you offer and instead of plugging
3 in the number of student athletes on the squad
4 list the first day, you plug in that number
5 that is assigned to that sport.

6 Now, there is John Parry from
7 Butler who suggested this -- suggested that we
8 have sort of a professional staff sit down and
9 say, gee, this is how many people should be on
10 a rowing team, this is how many people should
11 be on a soccer team.

12 My thought would be to use
13 the average number of participants in the NCAA
14 statistics so if you had soccer and the average
15 number of soccer players was 21, you would use
16 21 and you add that up and that's how you measure
17 your compliance with the proportionality as
18 opposed to you add up the men and you add up the
19 women and you compare the percentages versus the
20 percentages of -- in the student body and that
21 gives the school an alternative way to measure.

22 The thing that this does in
23 my mind is that it eliminates the need to cap
24 men's sports, which I think we are all struggling

1 for a way to figure out how to do that without
2 taking away from the power and influence of Title
3 IX, and it also eliminates what I consider false
4 opportunities for women, which is sports teams
5 that bloat the number of women up on their roster
6 the first day knowing that in the end that those
7 student athletes probably don't have a chance to
8 compete, don't have access to coaching, might not
9 even have access to facilities, but they are on
10 the chart the first day.

11 So that's my proposal. Again,
12 I see it as an alternative. It's a suggestion
13 to the Office of Civil Rights that they look at
14 that as a model for an alternative way of meeting
15 proportionality as opposed to the present way.

16 Again, I don't see it in lieu of
17 the old system because I know there are people --
18 schools that have bought into the old system and
19 the present system, which means they want to have
20 100 and some women's rowers, they want to have a lot
21 of female participants and they want to cap the
22 men's and that's how they do it.

23 For those of us who don't want
24 to cap the men and don't want to create false

1 opportunities for women, this is another way for
2 us to do it. So that's it.

3 MR. GRIFFITH: Do we discuss that?

4 MR. LELAND: Yes.

5 MR. GRIFFITH: I think we're going to
6 want to have discussion on this.

7 MR. SPANIER: Well, I think that's
8 an excellent suggestion. I would like to be
9 supportive of that with one caveat. I think
10 the methodology for establishing that number
11 needs to be carefully thought out rather than
12 just taking a current snapshot of what exists
13 because the current snapshot would reveal some
14 of the tricks that you have identified that
15 some programs have used and they wouldn't
16 necessarily be very good numbers.

17 Now, maybe if you averaged
18 them over a thousand different schools, you
19 could find it. But I think what makes more sense
20 is the process of getting there where there would
21 be at least some degree of consultation because
22 in the end, a policy is going to be better if a
23 lot of people buy in.

24 MR. LELAND: Right.

1 MR. SPANIER: I mean, if you give
2 the coaches some input, I mean, if you give a
3 soccer coach or the soccer coach's organization
4 a chance to say, well, you know, we've all talked
5 about it and we think 20 is the right number as
6 opposed to having just done the calculation and
7 finding out it's 17.2 or 23.1 or something.

8 Of course, in the end, it's
9 going to have to match up somehow with all the
10 NCAA rules and --

11 MR. LELAND: Right.

12 MR. SPANIER: -- it would be nice
13 if the NCAA and it's governing system had a chance
14 to say, yeah, we've looked at your proposed numbers
15 and we think they are all okay except these two out
16 here are not how we do it.

17 So that's a technical thing
18 and if we were to have such a recommendation,
19 I would simply suggest that part of the wording
20 be that there could be some process that would
21 determine --

22 MR. LELAND: To determine the number,
23 yeah, I'm fine with that as a --

24 MR. SPANIER: -- what the sufficient

1 numbers are, but I think the idea is very good.

2 MR. GRIFFITH: Could you explain to
3 me how it works again? I'm sorry. I just don't
4 quite catch it.

5 MR. LELAND: Well, right now what
6 you do to determine the -- your proportion numbers
7 for participation opportunities is you add up the
8 number of athletes on the squad list the first day
9 of competition.

10 MR. GRIFFITH: Right.

11 MR. LELAND: And that's, in effect,
12 so we don't measure opportunity. We measure
13 actual participation --

14 MR. GRIFFITH: Right.

15 MR. LELAND: -- defined by the first
16 day.

17 MR. GRIFFITH: I've gotcha.

18 MR. LELAND: And I'm just saying,
19 you know, if you did a number of opportunities --
20 I mean, the one I thought was a heart rendering
21 story that we heard in Atlanta that sort of started
22 this off was the story of a Division III school
23 that had so many swimmers and some women swimmers
24 quit in the morning and they had to kick men

1 swimmers off in the afternoon. I thought that
2 was -- I mean, I think all of us were sort of
3 horrified by that and how Title IX got twisted into
4 that kind of outcome; this is a way where you
5 wouldn't have to do that.

6 MR. GRIFFITH: It's just a different
7 way of counting student athletes.

8 MR. LELAND: Yes. It's a different
9 way of -- oh, you would be counting. In my opinion,
10 you would be counting sort of opportunities as
11 opposed to actual participation.

12 MR. GRIFFITH: And you would go
13 to some neutral source to determine what the
14 appropriate number is?

15 MR. LELAND: Yes. And that's why
16 I took Graham's advice as a friendly amendment.

17 MR. GRIFFITH: Okay.

18 MS. FOUDY: So if you set a number,
19 your average, then, and you get twice as many that
20 come out and the coach wants to keep them, then,
21 you just count the average number?

22 MR. LELAND: Yes. I mean, if you
23 ended up -- for instance, we had this at our
24 school for the last, you know, let's say, ten

1 years running.

2 We've had 15 or 16 men's
3 basketball players and we give 13 scholarships.
4 You've got ten, 11 or 12 women's basketball
5 players and we get 15 scholarships. Title IX
6 would say, you know, if you had the proportionality,
7 we have a proportionality problem there even though
8 we budget more scholarships, we just carry less
9 women on the team because sort of the nature of the
10 thing and the thought would be you would count 15
11 for men's basketball and 15 for women's and then
12 the vicissitudes and the changes in the day-to-day
13 composition of the team wouldn't affect your
14 balance.

15 Now, you would also have to
16 meet the second part of the test as you indicated
17 yesterday in terms of, you know, uniform
18 scholarships, financial resources put into the
19 program. My interpretation is you couldn't --
20 if you had a crazy men's soccer coach who wanted
21 to keep 40 men and your women's soccer coach only
22 wanted to keep 20, you couldn't double the men's
23 budget and have twice as many games. You would have
24 to make it equal and the sort of laundry list would

1 have to be equal.

2 MS. GROTH: Ted, one more question
3 for clarification. Using the example of soccer,
4 if you set the opportunities at 30 for men's
5 soccer and women's soccer --

6 MR. LELAND: Uh-huh.

7 MS. GROTH: -- but you had 25 women
8 and 45 men, you would still just count 30?

9 MR. LELAND: Yes.

10 MS. GROTH: You wouldn't count the --

11 MR. SPANIER: Thirty of the men, but
12 only 25 of the women.

13 MR. LELAND: No. I would think you
14 would count 30 of both.

15 MR. DeFILIPPO: She is saying it falls
16 short of the 30 for the women.

17 MS. GROTH: Right.

18 MR. LELAND: No. But I'm saying
19 even if they fall short, you just add up the sports
20 you -- that's my concept. Now, it may be flawed
21 and I can't imagine you would have the scenario
22 you just laid out; 45 and 25. That doesn't seem
23 to --

24 MR. DeFILIPPO: I think he is

1 counting opportunities. Isn't that what you are
2 counting instead of heads?

3 MR. LELAND: I'm not counting
4 opportunities. I'm not counting heads. You
5 don't have to go out there and kick kids off
6 the team or add false opportunities for women
7 simply to meet Title IX goals. You have a set
8 of -- now, what this would mean on a practical
9 sense for a lot of schools, you have to add
10 sports for women. That's what's going to
11 happen.

12 MS. FOU DY: My only concern with
13 that is you are not -- if all else were equal,
14 like, budgets for recruiting, budgets -- going
15 out and getting players to come to the school,
16 then, okay, but now you're counting empty slots
17 and what are the reasons -- I mean, perhaps the
18 reason that some of those slots are empty
19 is because only 30 percent of the recruiting
20 budget was spent on recruiting women. So they
21 didn't find the best players to come necessarily
22 to that school yet you are still counting it as
23 an opportunity slot when that woman really wasn't
24 given a fair opportunity to come as a recruit,

1 if that makes sense.

2 MR. LELAND: Yes, I understand.

3 I think my system, you know, what I am suggesting
4 isn't all that well thought out and it certainly
5 is imperfect. My argument is the present system
6 is certainly imperfect as I watch it --

7 MS. FOUDY: Right.

8 MR. LELAND: -- because we
9 aren't measuring opportunity, we are measuring
10 participation and there are ways that flex with
11 the system as is presently done that does, in
12 my opinion, allow for a couple of uses.

13 MR. REYNOLDS: Excuse me, Ted,
14 looking at Julie's example, the fact that the
15 women would have a lower recruiting budget,
16 that in and of itself would be a violation
17 under your proposed plan.

18 MR. LELAND: I think you still
19 have to meet the --

20 MR. REYNOLDS: The laundry list.

21 MR. LELAND: -- I take
22 particular -- I'm not sure about the recruiting
23 budget issue. That's always been one that's --
24 for me, that's a side issue. In terms of uniforms,

1 quality facilities and all that other stuff, I
2 think in coaching, coaching salaries, et cetera,
3 I think, yeah, you would have to be -- you would
4 have to meet the second part of that --

5 MR. REYNOLDS: Uh-huh.

6 MR. LELAND: -- kind of which means
7 provide equal services -- goods and services to
8 the students.

9 MR. REYNOLDS: So, Julie, you believe
10 that it would be unfair if a school -- if there were
11 empty slots because a school did not put in the
12 efforts to get female athletes?

13 MS. FOUDY: Right. And then you are
14 counting these empty slots when really --

15 MR. REYNOLDS: When you didn't do
16 what you should have done to fill those slots?

17 MS. FOUDY: Right, which is what
18 the numbers are showing us right now. There is
19 only 30 -- I think it's 32 or 33 percent is
20 being spent on women in the entire recruiting
21 budget.

22 MR. LELAND: Well, that's it.

23 MS. COOPER: My turn?

24 MR. LELAND: Do we need somebody

1 to -- I think what we thought last night is we
2 would see if anybody would like to see this
3 proposal of mine, elaborated by staff and presented
4 in January. I think we need a show of hands. Now,
5 you're not voting for it. You're just voting
6 to take the next step and look at it. Okay?

7 Okay. That's good. We just
8 want to make sure there are at least two or
9 three or four commissioners who thought it was
10 worth the staff's time to go ahead and take
11 this to the next step, which is sort of to
12 think about it and write it up.

13 MR. BATES: Ted, at least for me,
14 it's the kind of thing I would like to think
15 about and it might help to see it fleshed out
16 a little bit more.

17 MS. COOPER: Okay. I heard --
18 we've heard a lot about surveys. I'm just
19 going to jump right into this. I think OCR
20 should conduct surveys to determine actual
21 interest levels. Instead of presuming that
22 enrollment figures are a close proximity for
23 interest, the department should consider
24 requiring colleges to conduct a survey of the

1 students on a periodic basis to determine the
2 interest and abilities of its male and female
3 students. I will cite LSU as an example.

4 MR. REYNOLDS: I think that OCR
5 should look into it. I'm not convinced yet
6 that it's feasible, but I think that there is
7 no good reason why we shouldn't look into it.
8 Right now, we do presume that enrollment is a
9 close proxy for interest. I think that interest
10 varies from campus to campus. I think that it's
11 clear that there has been increasing interest
12 on the women's side of the ledger over the years
13 and if we would have a regular survey -- require
14 schools to do regular surveys, we could capture
15 the changing interests in participating in
16 athletics. I think it's a good idea to look into
17 it.

18 DR. SIMON: Cynthia, this is one
19 of my major -- would be one of my major
20 recommendations, that we not only do surveys of
21 interest, but surveys at the high school level
22 and we have them on participation rates and of
23 interest rates as people are coming into the
24 universities and I have taken notes and I can

1 talk about that afterwards about where -- which
2 schools you conduct those surveys in and how you
3 conduct them.

4 I would say one thing, we have
5 expert national survey associations. Why have
6 OCR do it? Why don't you have National Opinion
7 Research Center at the University of Chicago,
8 for example, run the surveyor or some other --
9 the Roper Center or something like that so that
10 there is no question that these are independently
11 conducted surveys by experts who have been doing
12 this and doing it very well.

13 I would say that, for example,
14 at state universities, you probably want to do
15 the survey in more of the high schools in the
16 state. For national private universities, you
17 want to find out where do most of the regions
18 in the country do most of the students come
19 from? You might want to do the surveys
20 particularly in those regions.

21 I think we should talk with
22 experts and one of the things that social sciences
23 know about is how to run surveys. Let them do it.

24 MS. GROTH: Cynthia, could you

1 repeat your recommendation one more time for
2 us, please?

3 MS. COOPER: Sure. Conduct surveys
4 to determine actual interest levels instead of
5 presuming that enrollment figures are a close
6 proximity for interest. The department should
7 consider requiring colleges to conduct surveys --
8 conduct a survey of the students on a periodic
9 basis to determine the interest and abilities
10 of its male and female students.

11 MS. GROTH: I think there is a
12 place for surveys -- interest surveys, but I
13 think that's more in prong three if we are to
14 stay with the prongs. But I think interest
15 and ability surveys, there is a place in prong
16 three, but to replace the enrollment standard
17 with interest surveys, I think, is -- I wouldn't
18 agree with.

19 I was thinking about the
20 interest surveys last night and the interest
21 overall of girls participating and again, we
22 have almost 3 million high school girls
23 participating in sports, yet only 180,000
24 opportunities at the collegiate level. So

1 there is a clear indication that there is
2 interest for girls to participate. There
3 are just not as many opportunities.

4 MS. COOPER: But what --

5 DR. SIMON: But that's wonderful
6 that there is demonstrated interest and let's
7 show it. Let's highlight it and let's show
8 that we've measured it in a reliable and valid
9 manner.

10 I would think that we're not
11 taking away from prong one, we're simply refining
12 prong one to make it more meaningful.

13 MR. REYNOLDS: Yes. I'm curious.
14 Why would you like to just limit surveys to prong
15 three? What's the rationale for limiting the use
16 of surveys to that prong as opposed to using it
17 in prong one?

18 MS. GROTH: Maybe I would like to
19 switch the question to what's the rationale for
20 using surveys in prong one?

21 MR. REYNOLDS: Because enrollment --
22 using enrollment, it's a presumption that may not
23 be grounded in fact. We are right now operating
24 on faith. We are assuming that the interest

1 levels -- we have pegged it to what may turn out
2 to be an artificial indicator. It could be right,
3 but what is wrong with just doing some research to
4 find out if it's right.

5 Now, if the numbers show that
6 enrollment is a close proxy for interest, then,
7 by God, there is no reason to change it. But
8 if the data shows otherwise, why stick with
9 something that the data shows is not right?

10 DR. SIMON: And what data we
11 have suggests that there is not a very strong
12 congruence between interest, prior participation
13 and enrollment. Therefore, it's very important
14 that we look at it and get good data.

15 MR. BOWLSBY: This is off the topic
16 of recommendations, but I would like to ask the
17 question I hope somebody here can answer it.

18 In Dr. Kravitz's data, it
19 was in Tab D, Page 2, Item 7, there is a reference
20 in there where it says that 5.38 percent of male
21 participants in high school sports go on to find
22 participation opportunities in college. Now, 5.39
23 percent of female participants in high school go on
24 to find opportunities in college.

1 Now, I assume that's not --
2 that's participation opportunities, not
3 scholarships, per se. The data would be somewhat
4 skewed by just using the scholarships. It would
5 be skewed in favor of female participants.

6 Do those two numbers for the
7 dumb athletic director that doesn't know much
8 about statistics, does that mean that men and
9 women out of the feeder system are almost equally
10 likely to find a post high school participation
11 opportunity?

12 Is that what that means?

13 MR. SPANIER: That's the way I
14 read the data.

15 THE COURT REPORTER: I'm sorry.
16 I can't hear you. Would you please use your
17 microphone?

18 MR. SPANIER: I looked at that
19 data pretty carefully and that is how I interpreted
20 them.

21 MR. BOWLSBY: So from that, based
22 upon current numbers, current participation ratios
23 at the collegiate and high school level, males and
24 females are about equally finding participation

1 opportunities at the next level, is that correct?

2 MR. SPANIER: In relation to their
3 high school participation?

4 MR. BOWLSBY: Yes, in relation to the
5 feeder system. Okay. Thank you.

6 MR. LELAND: I would just like
7 to say that I think that -- gosh, I thought my
8 recommendation was going to be controversial.
9 Cynthia trumped me!

10 The -- I just -- what I think
11 Rita and what a lot of people are concerned about
12 is that as we struggle to provide equal opportunity
13 for women and use the present sort of imperfect
14 system that we have to measure proportionality,
15 et cetera, that we -- if we got on some kind of a
16 general interest measure of participation in post
17 secondary athletics and the numbers ended up being
18 significantly lower, let's say, 60 percent of the
19 men were participating and 30 percent of the women
20 were interested in participating --

21 DR. SIMON: Isn't it 58/42 now?

22 MR. LELAND: Yeah. Okay. 58/42.
23 I think there is a concern that would be -- I
24 would share that concern. That would be a

1 significant step backward. If we, then, used
2 our sense of fairness, which there are different
3 ways to measure fairness, to change the
4 proportionality requirements to say that now we
5 could satisfy Title IX by being at 42 percent
6 of participants and I just think that's -- to
7 me, that's a hard one to say that's fair even
8 though you can argue from an interest survey
9 that that might be fair. That's just a hard one
10 for me.

11 DR. SIMON: And, Ted, I'm not
12 saying that we should replace the participation
13 rates in high school or the interest expressed
14 prior to entering college completely, that we
15 should use that data rather than proportionality.
16 I'm saying we need to find a way of refining
17 proportionality. I'm not saying take the earlier
18 measures versus proportionality, but we have to,
19 I think, take them into account.

20 MR. LELAND: But I thought from
21 what Jerry said and from what Cynthia said
22 that there was sort of a -- that was part of
23 the motion, that if we did these interest surveys,
24 there is a potential down the road to replace

1 the measure of proportionality, the denominator,
2 whatever you call it, which is the percentage of
3 male undergraduates with the percentage of female
4 undergraduates who are interested in participating
5 in sports as identified by some interest survey.
6 That sort of -- that's what scares me. Is that part
7 of it?

8 MR. REYNOLDS: I don't think that
9 it would be as simple as that. I don't think
10 that -- well, first of all, it's interest and
11 ability. You also have to look at the competition
12 in the region and how the survey is constructed.
13 I wouldn't assume that it would be a general
14 survey.

15 I'm not sure how -- what the
16 mechanics are or how it would be done, to have no
17 expertise in conducting surveys, but I think that
18 it should -- it's a topic that we should at least
19 explore. I'm not saying that at the end of the
20 day, it would be a good idea because I don't know,
21 but I hear a push back just to the proposition of
22 exploring the idea.

23 DR. SIMON: Ted --

24 MR. LELAND: We'll go with Julie and

1 we'll come back.

2 DR. SIMON: Okay.

3 MS. FUDY: I know I have been
4 involved in athletics personally and I have
5 clearly a personal interest in this, but I
6 don't know if I'm crazy or if what I'm hearing
7 is crazy because I just think that it reminds
8 me of the days when women had to prove that
9 they wanted to vote, that women had to prove
10 that they wanted to own property, that women
11 had to prove that they wanted to go to medical
12 school, that women had to prove that they wanted
13 to be lawyers.

14 I think it creates a double
15 standard that now we look at those things that
16 once people probably ask for surveys for now
17 seems ridiculous, but to take us to a day where
18 we say women have to prove there is interest in
19 when we have created a vacuum historically for
20 opportunity, I think is a dangerous thing to go
21 to. I think it is very dangerous.

22 I think you are creating an
23 opportunity to freeze into place that hypocrisy
24 with a survey. The fact that there exists this

1 thought pattern that we have to prove -- women
2 have to prove that they are interested to be
3 afforded equal opportunity, in my mind, takes
4 us back many years.

5 MR. REYNOLDS: The characterization --

6 MR. LELAND: I'm sorry. Jerry, Rita
7 will be next.

8 DR. SIMON: I'm completely in favor
9 of equal opportunity for women in sports. I think,
10 however, we have to refine the measures that we
11 use to look at opportunity and I'm suggesting a
12 regression analysis, which would take into account
13 various factors and you see how much weight each
14 factor has, the interest factor, the prior
15 participation factor, the number of male and female
16 undergraduate students.

17 All of these factors are taken
18 into account and you do a regression analysis in
19 which you see how important each factor is. You
20 don't replace the number of male and female
21 undergraduate students with these other factors.
22 You just include them.

23 MS. FOU DY: And, Rita, I mean, I
24 think there is a place for surveys, but to say

1 that -- I don't know if I read you wrong, but
2 to say -- if you are saying it's not going to
3 replace proportionality, which provides equal
4 opportunity, then --

5 DR. SIMON: It's going to enhance
6 the prong one measure.

7 MR. LELAND: Let us sort of grab
8 a hold of this, at least the organization if we
9 can. Let's hear from Jerry and then Graham.

10 MR. REYNOLDS: Well, I guess my
11 first point is that this is not a demand that
12 women prove anything. We would take -- the
13 survey would apply to men and women on college
14 campuses and it's a tool just to quantify what
15 the interests are.

16 The interests will be what
17 they will be. It will vary from campus to campus
18 and it will change over the years. We will not
19 freeze anything into place because, as I have
20 said on several occasions, if we're going to go
21 down this road, it would have to be done on a
22 regular basis to capture the changes in interest
23 levels. That's the only way it would work.

24 DR. SIMON: And it could --

1 MR. LELAND: Graham?

2 DR. SIMON: I'm sorry.

3 MR. SPANIER: Well, I see the
4 purpose of this discussion as finding a way
5 to protect the progress and the societal games
6 that have taken place and to help the Department
7 of Education come up with a methodology for
8 enforcement and for the continued promotion
9 of equal opportunity.

10 So I think it would be very
11 unfortunate if we left on the table the analogy
12 that this was akin to taking away the right to
13 vote. I wouldn't want to be party to something
14 like that. I think that would be a very
15 unfortunate impression to leave.

16 We are not talking about
17 something akin to finding out through a survey
18 that women or certain minorities or college
19 students have voting rights that are less
20 than other groups of the population and,
21 therefore, we should take away the right to
22 vote.

23 I think what we are looking
24 for here is keeping the doors of opportunity

1 as wide open as possible to women, but at the
2 same time, not taking away opportunities for
3 others and having a monitoring and an enforcement
4 methodology and guidance for athletic administrators
5 on how to create the right balance.

6 MR. LELAND: Cary?

7 MS. GROTH: The beauty of the
8 three-prong test is that it offers flexibility.
9 The surveys -- you can use the surveys in two
10 and three. I'm wondering why -- why we would
11 want to change prong one as it refers to surveys
12 because, in essence, if you do that or if we do
13 that, we're just creating another prong two or
14 prong three.

15 MR. BOWLSBY: Ted?

16 MR. LELAND: Rita and then Bob.

17 DR. SIMON: Julie, I want to say
18 that, in fact, the existence of these surveys
19 and publicity about the results of the surveys
20 could, in fact, enhance women's interest and
21 willingness and desire to participate.

22 When they hear about the
23 results, my God, only 42 percent of us are
24 interested in sports? That can't be true.

1 Let's go around and mobilize more interest.
2 The very existence of surveys would arouse,
3 I think, more interest on the part of the
4 gender that is at the moment under-represented.

5 MR. LELAND: Okay. Bob and then
6 Brian.

7 MR. BOWLSBY: Well, it seems to
8 me we're all around the essence of this discussion.
9 I think it was Graham that made the comment
10 yesterday that the only thing that is law in
11 what we are looking at is the language of Title IX.
12 Everything else is interpretation and bureaucratic
13 development of what the last 30 years have held in
14 store.

15 I think at some point, we need
16 to get to the discussion of what many people have
17 told us is a flawed entry assumption and that is
18 that the undergraduate population has anything
19 whatsoever to do with athletics participation.

20 It isn't probably any more
21 valid than using the percentage of males and
22 females in the entire population in our country
23 or the percentage of male and female participation
24 in the feeder system or the percentage for that

1 matter of people in the population that drive red
2 cars.

3 It's the one piece of this
4 that I have struggled over throughout all of the
5 discussions is that it seems that lots of people
6 believe that the comparison of the undergraduate
7 population is a flawed entry assumption. If we
8 don't talk about that, I don't think we are going
9 to get our arms around any of the rest of the
10 substantive issues that are part of this topic.

11 (Whereupon, Secretary Paige
12 entered the proceedings.)

13 MR. LELAND: Okay. Brian?

14 MR. JONES: Now that the boss is
15 here, I'll make it quick! I actually just wanted
16 to respond to Cary's point because I think you
17 actually raise a good point and this is the way
18 I would think of why it at least makes some sense
19 to at least examine further Cynthia's suggestion
20 with respect to prong one.

21 You ask why a survey would make
22 sense in prong one and it goes back, I think --
23 at least one argument goes back to what I was
24 talking about yesterday. I probably sound a little

1 bit like a broken record on this point, but that is
2 to again get back to thinking about Title IX as what
3 it is, an anti-discrimination statute.

4 I talked about how in other
5 anti-discrimination context, when you are
6 talking about statistical imbalances, you are
7 looking at statistics as creating an inference
8 of discrimination. Generally, what happens
9 is an institution that has a policy that creates
10 this kind of statistical imbalance has an
11 opportunity to go back and to show, you know,
12 there is a nondiscriminatory reason for the
13 imbalance.

14 Here, I think that one
15 rationale for using a survey as sort of your --
16 to determine what your denominator is for the
17 statistical purposes in prong one does. I mean,
18 it allows an institution to point to something
19 that may, in fact, explain part of the imbalance
20 and that is that well, you know, in this particular
21 case the interest level is different.

22 The interest level closely
23 tracks, you know, the rate at which we provide
24 opportunities. I agree. I mean, I think Julie

1 is absolutely right and we talked about this
2 yesterday, that you obviously have to be careful
3 about these things because you don't want to be
4 ever put in a position where you freeze into place,
5 you know, a discriminatory status quo.

6 That speaks more to what
7 Graham talked about yesterday about just --
8 that speaks more to how you use the survey.
9 That means that you continually update surveys,
10 you use surveys in conjunction with other
11 instruments. Fundamentally, I think one good
12 rationale for this is that you can allow a
13 school a way of showing that there is a
14 nondiscriminatory reason for the imbalance.

15 MR. LELAND: Okay. Let's do
16 this. Cynthia and I have -- let's allow one
17 or two more comments on this issue.

18 MS. COOPER: No. Let's just
19 move on. We have discussed this fully.

20 MS. MCGRAW: May I make a
21 comment?

22 MR. LELAND: Muffet?

23 MS. PRICE: Muffet has a comment.
24 Go ahead, Muffet.

1 MS. COOPER: Hey, Muffet!

2 MS. MCGRAW: This reminds me, this
3 survey, a little bit of the NCAA using the SAT
4 to get into college and that was supposed to be
5 a measure of intelligence and there was a lot
6 of talk about it as racially biased and that it
7 was discriminatory. In the next few years, we
8 will not be using the SAT to get into college
9 anymore. I think the interest survey could have
10 a big gender bias. That's my concern about the
11 survey.

12 MS. COOPER: Okay.

13 MR. BATES: I guess I had a
14 question. When -- Cynthia, when you first made
15 this recommendation, it seemed rather simple
16 to me and it seems to be getting, I guess, more
17 complicated than I can follow at the moment.

18 Prong three talks about fully
19 and effectively accommodating the interests and
20 abilities of the under-represented sex. Now,
21 we have some ways of getting that, but it seems
22 to me that in addition to these, having a survey
23 to get at interest, which is historically how we
24 have tried to measure interest is through some

1 sort of survey.

2 So I don't -- I mean, it seems
3 to me that we are beating this one a bit in a way
4 that I don't understand because we are -- we do
5 have a prong that talks about interest. I don't
6 see any reason why in addition to other things,
7 which is what I thought, Julie, we talked about
8 yesterday, not using this survey by itself because
9 there are some specified other ways that you can
10 go about doing that.

11 I must say, Jerry, I don't see
12 the need for it in prong one. I mean, I don't
13 see the connection there. Clearly, it points to
14 prong three and that's how I heard it and that's
15 what I thought we were talking about.

16 MR. REYNOLDS: Well, if the use of
17 survey instruments is helpful in prong three, is
18 it possible that it could be helpful in other
19 prongs? Again, I get the distinct impression
20 that prong one is a sacred cow. No one wants
21 to touch it. That's one theory.

22 Another one is we don't want
23 to look at -- we don't want to quantify interest
24 and if throughout our documents it talks about

1 interest and abilities, interest and abilities,
2 what's wrong with trying to quantify interest
3 and abilities in a precise manner?

4 If we have social scientists
5 who do this stuff for a living who feel confident
6 that it can be done and be done in a fair way,
7 then, it seems to me that at a minimum, we should
8 at least explore the feasibility of doing it.

9 What I'm hearing is let's not
10 listen to the experts. Let's not even see if
11 it's feasible. Again, I start out by saying I'm
12 not sure it's feasible. All I'm saying is let's
13 look at it.

14 MR. BATES: Jerry, I'm not saying
15 never say never. I guess it seems to me it's a
16 stretch. It is directly tied to prong three,
17 as I read it. I think it's a stretch to say
18 let's also use it for prong one. That's all I'm
19 saying.

20 MR. REYNOLDS: And you may be right.
21 All I'm saying is let's do the legwork to find
22 out if you are right.

23 MR. LELAND: Okay. Listen, one
24 or two more comments. I think there is enough

1 public -- there is enough commissioner support
2 for this. We'll move to the next level and ask
3 the staff to do some work on it.

4 Let's try to eliminate the --
5 Julie, one last thing. Then we've got to be
6 fair to the other commissioners.

7 MS. FOU DY: Just to follow up on
8 what Percy has said and what Ruth said, I think
9 one of the things that I think we need to remember
10 is that when we are looking at this, we're making
11 the assumption that it's not based on something
12 that's had history discrimination and I think we
13 have to because, you know, a good example is I
14 just met a team here in Philadelphia that's
15 comprised of over 40 women over 40 years old.

16 It is all women that are working
17 moms who row on this dragon boat team. They just
18 started this team. They are all breast cancer
19 survivors. They just started this team last year.
20 None of them had any experience in sports because
21 they came pre-Title IX and now they are vying for
22 the world championship in August next year and this
23 has been created by one woman who said let's start
24 this team and let's do this.

1 Now, if you were to take a
2 survey of them, they would say they are very
3 interested in sports. I think it changes and
4 you have a history of not providing opportunities
5 and it changes day-to-day depending on what your
6 circumstances are and the way you grow up and how
7 you have been exposed to it. I don't think we
8 can avoid that fact.

9 MR. LELAND: Okay. That's a great
10 discussion. Let's try to move on.

11 Gene, do you have a
12 recommendation? You're next up.

13 MR. DeFILIPPO: I'm next?

14 MR. LELAND: Yes, sir.

15 MR. DeFILIPPO: Okay. At all of
16 the town meetings, I have been a proponent for
17 more clarity and guidance for using prongs two
18 and three. I have asked those questions of
19 panelists at every one of our town meetings.

20 However, yesterday, I, too,
21 felt embarrassed at first, but then I wasn't
22 embarrassed because it just shows the lack of
23 clarity and understanding and advice that many
24 of us on college campuses have received from

1 OCR.

2 So I would like to recommend
3 that OCR not should, but must provide us with
4 clear and consistent policy guidance by, among
5 other things, issuing a new written policy
6 statement.

7 In addition to that, that would
8 be for prong one. We absolutely need more clarity
9 and guidance for using prongs two and three. That
10 would be my recommendation.

11 MR. LELAND: Any discussion?

12 MR. GRIFFITH: Can I ask a question?

13 You used the phrase a new written
14 policy statement. May I -- I want to suggest,
15 and this has been sort of my standard speech,
16 that whatever OCR does would be strengthened, if
17 they put it out for comment if they went through
18 the process that's created to make something law.
19 That's to make it part of the regulations.

20 The 1979 interpretation is
21 just that. I think there are substantial questions
22 about the strength of the '79 interpretation
23 because it isn't -- it doesn't have the same
24 weight as the 1975 regulations. We have a

1 process for creating law in our country. I
2 don't know if that's more than you would
3 want to do.

4 I think we would all agree
5 that clarity is better here. I'm wondering
6 if you would be agreeable, or maybe I can just
7 wait until my time, to make a recommendation
8 that they do it in more than the form of a
9 letter, but that they do it -- put it out for
10 comment and go through the proposed rulemaking
11 process.

12 MR. DeFILIPPO: Well, that would
13 be up to OCR, but mine is to issue a new written
14 policy statement that would provide us with the
15 clarity, the consistency and the guidance that
16 we need and the interpretation for prongs one,
17 two and three.

18 MR. LELAND: You don't take that
19 as a friendly -- it was friendly, but you're not
20 going to --

21 MR. DeFILIPPO: It was friendly,
22 but --

23 MR. GRIFFITH: Give it to OCR and not
24 me.

1 MR. DeFILIPPO: Okay.

2 MR. LELAND: Okay. It'll be up to
3 Tom to give it to OCR.

4 Other comments on this proposal?

5 MR. SPANIER: Yes, well, trying to
6 dutifully write up something at the 10,000-foot
7 level, I mean, coincidentally it is very close to
8 what I drafted as to what you said.

9 Let me try some wording and
10 see if it's consistent. I wrote the Department
11 of Education, through its Office of Civil Rights,
12 should issue a new regulation policy interpretation
13 or letter of clarification that clarifies Title IX.
14 In addition, such a clarification or policy
15 interpretation should consider those sentiments
16 of the Commission that have a preponderance of
17 support.

18 MR. LELAND: Is that your global --

19 MR. SPANIER: Well, that's one of the
20 two global ones.

21 MR. LELAND: Okay. But do you want
22 to add that onto what he is stating?

23 MR. SPANIER: Yes. I was just trying
24 to -- I was attempting to go give it a little more

1 specificity, but I think it's -- they overlap about
2 90 percent.

3 MR. LELAND: Can we -- staff, can we
4 subsume the two into this?

5 Okay. More comments on Gene's
6 proposal then. Is there a consensus that we
7 should move this forward as a draft and ask the
8 staff to draft it up? We're not approving
9 anything. We're just asking the staff to draft
10 up a recommendation. Are we okay on that?

11 MS. COOPER: We're up to Graham.

12 MR. LELAND: All right. Graham,
13 you are next.

14 MR. SPANIER: Oh, okay. Well,
15 this is just another one. This might require a
16 little discussion though. The concept of a safe
17 harbor test or prong should be abandoned in favor
18 of a test that puts the prongs on a more equal
19 footing. Additional ways of demonstrating equity
20 beyond the existing three-part test should be
21 studied. In addition, the evaluation of compliance
22 should include looking at all prongs in aggregate
23 or in balance as well as individually.

24 MR. LELAND: Okay. Discussion?

1 Julie?

2 MS. FOU DY: Could you read it one
3 more time? I'm sorry. I'm a little slow this
4 morning. I need some coffee.

5 MR. SPANIER: Yes. The concept
6 of a safe harbor test or prong should be abandoned
7 in favor of a test that puts the prongs on a more
8 equal footing. Additional ways of demonstrating
9 equity beyond the existing three-part test should
10 be studied. In addition, the evaluation of
11 compliance should include looking at all prongs
12 in aggregate or in balance as well as individually.

13 What I'm trying to capture
14 there is some of our discussion about this awkward
15 situation we have where two of the prongs have been
16 rendered almost meaningless to most athletic
17 administrators in this country because of the
18 evolution of the concept of a safe harbor.

19 I think if there is any merit
20 in those two other prongs, we need from the Office
21 of Civil Rights some greater level of clarification
22 of how you would actually use those prongs, what
23 they are, how you get from here to there, but that's
24 only going to be meaningful if they are put on an

1 equal footing with what is now the safe harbor
2 test.

3 You've got -- you can't pull
4 one out -- I mean, part of the problem we have
5 right now, I think, is that we have identified
6 one test as the ultimate test. I think if you
7 say there are a variety of ways to get from
8 here to there and to demonstrate and promote
9 equity in athletics, it -- that's a step forward.

10 We've also said, or maybe I've
11 been the only one to say it, that I'm not sure
12 that there are just three and only three ways
13 to promote equity and demonstrate it. I can't
14 think of what a fourth or fifth way might be,
15 but I think it should be explored.

16 Then I think the main point
17 I'm making is while it might be legally nice
18 and neat and it would simplify the life of an
19 athletic administrator to say I'm going to
20 pick that test and show you why I'm at that test
21 and so don't bother me with the details of any
22 other aspect of this. I don't think that's quite
23 right.

24 I think you have to be willing --

1 I mean, you could use an individual test, I'm
2 saying, as well individually. You could say,
3 okay, I'm picking proportionality and we're
4 proportionality so that should be good enough.

5 Okay. Fine. But in the real
6 world, things aren't that simple and shouldn't
7 we allow a high school, a college and university
8 and shouldn't we allow the Office of Civil Rights
9 and their investigators and shouldn't we allow
10 the courts, if it comes to that, to examine a
11 balance between what schools are doing.

12 Maybe they are 90 percent of
13 the way towards meeting interest and abilities.
14 Maybe they are 95 percent of the way to meeting
15 proportionality. Maybe they just added a sport
16 last year. So it is of diminimus relevance that
17 they are a little off on each of the three
18 because if you look at the whole picture, they
19 have done about one of the best jobs of getting
20 there even though if you had to say we're picking
21 this one prong and we are short there. Therefore,
22 there is something wrong with you. That might be
23 right when another school might be so divergent
24 in proportionality, but happens to have added a

1 sport last year that we say they are okay, we're
2 going to leave them alone, when you compare the
3 two schools, there is really no comparison.

4 It's a way of bringing a little
5 common sense to how things actually operate and
6 I think could be a way of, you know, minimizing
7 some of the game playing.

8 MR. LELAND: Okay. Questions?
9 Rita?

10 DR. SIMON: Graham, in principal,
11 I like your idea, but as I start thinking about
12 it, I wonder how you operationalize it because,
13 for example, if you do find universities that
14 use the -- that are in keeping with Title IX in
15 terms of proportionality, that 52 percent of the
16 full-time undergraduate and women, they get 52
17 percent of the scholarships and then men get 48
18 percent, then, if you have that, do you -- what
19 do you do with prongs two and three? They are
20 giving the proportional number of scholarships.

21 No, there has not been expansion
22 of sports programs for women and no, there haven't
23 been any demonstrations of whether women's interests
24 in sports are being represented, prong three, but

1 you do have the 52 percent of the women getting the
2 scholarships.

3 So how do you add the three
4 prongs together? You give different weights to
5 them? Are they all weighted equally because if
6 prong one is, in fact, met what do you do with
7 prongs two and three to enhance compliance?

8 MR. SPANIER: I don't have
9 all the answers. Maybe you don't do anything.
10 I'm saying maybe -- I'm saying as well as
11 individually. Yes, some schools may say we
12 are demonstrating our compliance this way.
13 There is a whole history and body and law
14 and so that's all right.

15 I'm just thinking if I were
16 a civil rights investigator going into a school,
17 I don't like the idea of having the university
18 in a position to say we're only talking to you
19 about this one prong and don't stick your nose --
20 you have to look at the big picture.

21 We do this all the time in
22 our own sphere of endeavor. When somebody comes
23 in to evaluate our law school or medical school
24 or college of engineering, they've got a whole

1 set of questions they are looking at and they
2 are obligated to look at them all and make their
3 accreditation decision in balance on how the
4 whole picture looks.

5 To say we're just going to
6 look at this one thing and we don't care how
7 deficient you are in the other areas, that
8 that is irrelevant, I believe that what this
9 does, I mean, it's really written with some intent
10 to be A, more flexible and B, more realistic in
11 the sense it brings some common sense.

12 MR. LELAND: Questions, Percy?

13 MR. BATES: Graham, I think I
14 agree with most of what you said and I do have
15 some question about the potential outcome, but
16 I'm just wondering if we followed Gene's
17 recommendation and with what you added to it,
18 couldn't we get most of what you outlined?

19 MR. SPANIER: Well, we -- I think
20 this would be -- this one recommendation would
21 presumably lead to something that would be in a
22 larger clarification. I think, you know, the
23 most -- probably the most important part of what's
24 in this second recommendation that I have written

1 gets to the concept of should one test be the safe
2 harbor because that -- that is the -- that's the
3 source of maybe 30 percent of the testimony we have
4 heard from 250 people. I mean, that -- that really
5 highlights a big chunk of frustration that a lot of
6 people have identified for us.

7 MR. LELAND: Okay. Let's move through
8 this quickly. We are committed to a break soon.
9 We'll take Julie and then Rita.

10 MS. FOU DY: Graham, I understand
11 what you are saying and I like a lot of it. I
12 think what we all want is the three-prong test
13 to have equal strength on each prong, but I think
14 we differ on how we want to get there.

15 One of the things that I see
16 is we want to make two and three stronger, but
17 at the same time, we don't want to weaken one
18 because we need some type of analytical approach
19 to it. I think my only concern was with your
20 first sentence. I don't know if you want to read
21 it again.

22 MR. SPANIER: Okay. Here's what I
23 would envision, and this is the kind of thing that
24 you've got to get lawyers to write up the words

1 on it. I would envision that any examination of
2 compliance of Title IX would look at the numbers.
3 I mean, you know, you are looking at
4 proportionality. Of course, that should always be
5 looked at.

6 I wouldn't back off from that
7 being examined prominently under any scenario.
8 My concern is the legal definition of that test
9 being defined as a safe harbor because that has
10 so significantly muddied the water on the other
11 tests, that it's an underlying, big source of
12 confusion that's out there.

13 Until you give the Office of
14 Civil Rights permission or the mandate to re-examine
15 this safe harbor concept, I don't think we're going
16 to get to wherever we're going to get on the other
17 prongs. That's all I'm trying to communicate with
18 that.

19 MR. LELAND: Rita and one or two
20 other questions.

21 DR. SIMON: Graham, again, I
22 think the only way it makes sense to add the
23 three prongs together is if you are not meeting
24 the proportionality test. If you meet the

1 proportionality test, then, anything else that
2 you add is, I don't know, icing on the cake or
3 something like that.

4 So I think you have to say
5 how much weight do we give to each of these
6 measures? Do we give them equal weight? Do
7 we give prong two and three more weight than
8 prong one? It seems to me that we have to
9 take into account the fact that it would only
10 make sense to add them together if, in fact,
11 you were under-representing women at the prong
12 one level, that there are over 50 percent of
13 women undergraduates and they are not getting
14 50 percent of the scholarships.

15 The most radical suggestion or
16 comment that we heard really hasn't been talked
17 about and that is are we dealing with a relevant
18 population of full-time undergraduate students, if I
19 understand you correctly.

20 That's the most radical comment,
21 I think, that's been made this morning and you
22 might want to take that into account as you
23 reconsider the prongs and the relevant values.

24 MR. LELAND: Okay. I feel there

1 is a consensus that people liked what they heard.
2 I shouldn't categorize it that way, but people
3 would like to have Graham's proposal written up
4 and take a look at it in January. In no sense are
5 we approving anything right now, but we're just
6 wanting to move forward with it. One or two more
7 questions, then, we will break.

8 MR. BOWLSBY: Ted, I'm compelled
9 to make a little bit of a qualification on that.
10 I don't consider my assertion radical whatsoever.
11 I considered it fundamental to the issue. I
12 think --

13 DR. YOW: Bob, you don't want to be
14 radical?

15 MR. BOWLSBY: It's central to what we
16 are talking about.

17 DR. SIMON: Bob, it wasn't a negative
18 comment either.

19 MR. LELAND: Rita appreciates
20 radicals!

21 Let's take a 15-minute break,
22 if we could, and readjourn on time if we could.
23 Thank you.

24

1 (Whereupon, after a short
2 break was had, the
3 following proceedings
4 were held accordingly.)

5 MS. COOPER: Can the commissioners
6 start to come back?

7 MR. LELAND: If we could come to
8 order, please? Commissioners, could you please
9 locate your seats?

10 MS. COOPER: Today, I have the
11 honor of introducing my friend and Houston
12 neighbor, Secretary of Education, Dr. Rod Paige.

13 Over the years, Dr. Paige
14 has excelled as a coach, teacher, dean and
15 superintendent of schools. Today, he excels
16 as our nation's Secretary of Education.

17 Since becoming secretary in
18 early 2001, Secretary Paige has worked tirelessly
19 on behalf of the nation's students, schools and
20 colleges. The Secretary created this Commission
21 in order to expand opportunities and ensure
22 fairness for all college and interscholastic
23 athletes.

24 Both the President and the

1 Secretary fully support Title IX. The Secretary
2 was right when he made the decision to form this
3 Commission and I know that I speak for all of us
4 when I say we are honored to be a part of your
5 team.

6 Secretary Paige, we are honored
7 to have you here today. Ladies and gentlemen,
8 my friend, the U.S. Secretary of Education, the
9 honorable Dr. Rod Paige, America's coach!

10 (Audience applause.)

11 DR. PAIGE: Thank you, Cynthia,
12 for that warm introduction!

13 MS. COOPER: Bring your microphone
14 closer!

15 DR. PAIGE: I'm real pleased to
16 have this opportunity and because primarily I
17 just wanted to come and thank you for your
18 service and for what you are doing. Each
19 of you have incredibly busy schedules, but
20 yet you take time to set aside those schedules
21 and come and do this. It's amazing really.

22 I was just talking to Dr. Yow.
23 I was the athletic director of Texas Southern
24 University, a small university, but I know what

1 it is to have to put on an event for 70,000 or
2 80,000 people every other week, right in the
3 middle of while she is getting ready to go to
4 the Peach Bowl.

5 Ted is breaking in a new coach.

6 MR. LELAND: Trying to!

7 DR. PAIGE: Trying to!

8 Cynthia is getting in condition
9 again so she can go back into the WBA. Each one
10 of you have a schedule, but yet you have chosen
11 to do this and the enthusiasm that you have shown.
12 I'm deeply grateful and the President is deeply
13 grateful and that's the chief message that I want
14 to -- want to convey.

15 As I was sitting here, I was
16 thinking what a wonderful country this is to give
17 and take of a discussion surrounding an idea
18 that's going to influence policy, that's going
19 to impact the lives of Americans for years. It's
20 very important. Democracy is not a tidy process,
21 but it's a great process. So thank you for that.

22 You have been asked to gather
23 the facts, listen to what Americans have had to
24 say and this is what, the fifth -- fifth meeting?

1 You have been in four different cities listening
2 to other Americans and make some recommendations.

3 This is different from many
4 places where one or two individuals sit in a
5 room and come up with policy and make rules that
6 everybody has to jump and salute to. What a
7 great country we live in.

8 This is a difficult issue.
9 That is why we wanted to get the very best minds
10 we could to discuss it and talk to us about it.
11 We just want to make a good thing better. We
12 want something to help all Americans.

13 I know you have heard from
14 50 experts including general counsels of
15 universities and athletic people, civil rights
16 people, just plain people. And now, you are
17 getting to the point where you have to take
18 all of that information and condense it and
19 come up with something that's going to be good
20 for all of us.

21 I wanted to just come and
22 listen and I'm benefited by just the brief part
23 that I have heard, but I'm going to sit through
24 the rest of it today and hear more because you

1 are great Americans and you are contributing to a
2 great country.

3 So to both of the chair people,
4 thank you for your leadership. Let's just keep
5 going. I'll do what I came to do. Now, I'll just
6 sit back and listen. Thank you.

7 MR. LELAND: Thank you.

8 MS. COOPER: Debbie?

9 DR. YOW: Is Graham finished?

10 MR. LELAND: Yes.

11 MS. COOPER: Yes.

12 MR. SPANIER: I have more, but not
13 now.

14 DR. YOW: Graham has more, but not
15 for right now.

16 Okay. So don't pummel me.

17 Okay? This is one idea, Ted, and I want to start
18 making assumptions and I'm not going to take the
19 global approach exactly that Graham took.

20 Being in athletics, I want to
21 know what the target is. Show me the target,
22 show me the basket, show me the goal. As soon
23 as I know what that is, then, I know what to hit.

24 I have real issues with, I think,

1 prongs two and three for that reason. I'm not
2 sure what those targets are exactly and whether
3 or not I ever am deemed to be within the scope
4 of those is in large part related to who reviews
5 the information and that's different from
6 institution to institution. So I don't like the
7 way any of that feels.

8 So here are my assumptions
9 and I'm going to offer a specific, pragmatic
10 application. The assumptions are that there
11 is an unmet need for women and men interested
12 in sports. That's just an assumption. You
13 can disagree with my assumptions, but I wanted
14 you to understand where I'm coming from.

15 Assumption two is there is a
16 need to provide a greater number of scholarships,
17 scholarship opportunities for women and a need
18 to provide a greater number of participation
19 opportunities for men and women.

20 With the men, it takes the
21 form of the walk-on problem or dilemma more
22 than anything else. For women it could take
23 the form of additional scholarships to existing
24 traditional teams or it could be adding women's

1 teams.

2 The third assumption is that
3 there is a need to have a standard that's easily
4 measurable, easily enforceable, objective and
5 that that is beneficial to those of us who don't
6 want to get bogged down in using periodic surveys
7 because the target, it changes, everything changes
8 every time you use one.

9 The fourth assumption is there
10 is a need to provide a degree of wiggle room.
11 It provides the flexibility to allow for those
12 walk-ons, to not be penalized for people who
13 transfer out of your institution in mid-year
14 to go play at another institution or for people
15 who quit teams because they are not getting
16 enough playing time or individuals who aren't
17 on the teams because they are academically
18 ineligible. There is a cadre of reasons why
19 there's people that disappear from the landscape.

20 The fifth and final assumption
21 is that there is no logical flow to tying the
22 undergraduate enrollment ratio to athletes in
23 this male to female ratio. There is no logical
24 flow.

1 Those are my assumptions.

2 With those assumptions, I offer the following
3 for discussion. This is the part where you
4 don't pummel me. Okay? Just remember that.
5 Be gentle.

6 Because of those assumptions,
7 I think it would be worth considering having a
8 requirement or a prong -- I hate the word prong,
9 but I don't have another word for that -- a
10 possibility of having 50 percent female and 50
11 percent male at all institutions. Remember the
12 assumptions, that there is an unmet need.

13 So you just start with 50/50,
14 but you also include a different variance. You
15 would allow somewhere between a five and seven
16 percent variance for scholarships and participation
17 opportunities and the reason that becomes valuable
18 is it provides that wiggle room for the walk-ons,
19 for the transfers, for the people who are
20 academically ineligible, all the things that can
21 happen to you.

22 The results would be the
23 following: It would vastly improve the current
24 status for women in sports because when you look

1 at the situation of 50/50 and five to seven
2 percent variance, let's say it's a seven percent
3 variance, just as an example, the worst it can
4 get, Julie, if you want to look at a worst case
5 scenario, the worst it can get is something like
6 53 percent of the population at a respective
7 institution would be male and 46 percent would
8 be female.

9 If you look at those numbers
10 across the country right now, you know that 46
11 is an admirable target for a number of these
12 institutions who someone pointed out are as many
13 as 30 percentage points out of compliance.

14 There would be, in that case,
15 no need for survey documents and there would be
16 no need to worry about using the female enrollment
17 numbers. I'm being very candid here. If it's
18 true that by the year 2007, that I believe it was
19 said, Ted, 56 percent of our undergraduate
20 enrollment in collegiate institutions will be
21 female, then, that becomes a non-issue as well.

22 So we stop the bleeding for
23 the men. We vastly improve the situation as it
24 currently exists for the women, but we provide

1 wiggle room, that variance, to account for
2 walk-ons and all the other nondiscriminatory
3 types of situations that occur that none of us
4 as ADs know are coming until they happen.

5 If you did that, then, you
6 don't have to worry about any other prong. You
7 don't have to worry about surveys and you don't
8 have to be concerned about the upwardly moving
9 female undergraduate enrollment and you help your
10 walk-ons. That's it.

11 MR. LELAND: Okay. Question, Jerry?

12 MR. REYNOLDS: Well, that is a
13 radical proposal. Have you taken into account
14 the -- that some schools are going to have to
15 spend a significant amount of money to meet your
16 targets? I think that Stanford and the University
17 of Maryland are in pretty good shape, but there are
18 other institutions that have -- that their -- in
19 terms of the numbers are way out of compliance.
20 You just use the 30 percent figure.

21 Would you consider a phase-in
22 period because I see -- I see some institutions
23 may have difficulty coming up with this amount
24 of money in a short period of time.

1 DR. YOW: There are a couple of
2 things, Jerry. One of them is there -- of
3 course, the reason does matter in terms of --
4 it's an interesting dynamic because there would
5 be people who say, well, they are out of compliance
6 because they didn't do anything the last 30 years,
7 but then there are other people that say, okay,
8 well, that's in the past. Let's deal with the
9 future and let's give them a reasonable opportunity.
10 I think a reasonable opportunity should be given
11 for people to phase in. I don't know what that
12 would be exactly.

13 I also think that the other
14 argument, if you will, against this would be
15 when you say seven percent variance, that instead
16 of using it for what it's intended to be, that
17 there will be institutions that cap women's
18 opportunities within that seven percent variance,
19 but even if that is true, it vastly improves the
20 state for women, the opportunities for women in
21 athletics, from what it is currently. So that's
22 why it doesn't really, really bother me.

23 And it also, on the other side,
24 remember, if proportionality stays in place as we

1 now know it, then, and I did refer to as stopping
2 the bleeding, and I do see it that way actually,
3 I don't -- I can't imagine having an athletic
4 program that because the undergraduate enrollment
5 for females reaches 56 percent and continues to
6 escalate up, that we turned our athletic program
7 to find that we have many more women in our
8 program than we do men because it's tied to the
9 undergraduate enrollment rate. So I see it kind
10 of as a compromise on both sides.

11 MR. LELAND: Okay. Other questions,
12 Graham?

13 MR. SPANIER: Yes. Debbie, what I
14 see your proposal doing is trying to get at some
15 of the very same underlying issues as other
16 things that have been put on the table get at,
17 but with a different methodology.

18 The problem I would see with
19 yours is that, you know, at the operational level,
20 it really would conflict with a lot of the other
21 things that have been put on the table because
22 you are really arguing let's just, plain and simple,
23 go to a standard of proportionality and allow more
24 flexibility around it and that would be in conflict

1 with other sentiments I and some others have made
2 that we really need to think more broadly.

3 I guess my reaction to your
4 proposal would depend on whether it became the
5 defect of a standard or whether it is just
6 another way of meeting the -- another way of
7 being able to demonstrate gender equity. I
8 think -- I think we're trying to get at the
9 same thing, but it really doesn't match up with
10 some of the other things we have been saying.

11 DR. YOW: I don't do well, and I
12 don't think the majority of the ADs who have
13 to -- institutionally, I see benefits as well.

14 I like starting from the
15 assumption that there is enough interest in
16 sports for women that it would be 50/50, but
17 then allowing the variance and that, as I said,
18 it might equal that that's set as a cap, if
19 you will, for women. Even if it were, the
20 situation in the long run, if given the phase-in
21 would be vastly improved over what it is.

22 We sidestep this periodic use
23 of -- Graham, I'll tell you what. I might not
24 feel the way I do if I actually saw the document,

1 but sitting here at the table talking about some
2 survey that I have no clue as to what the survey
3 is going to say, I mean, it's hard for me to
4 support that concept because I might not agree
5 with what the survey says. It's not my field.
6 I'm presuming that if you do the survey once,
7 you're going to do it again. Then interests change
8 and the target moves. It just seems something
9 very right about starting with equal opportunity,
10 this 50/50.

11 MR. SPANIER: Am I interpreting
12 what you are saying that what you are really
13 arguing for is for those institutions that wish
14 to use proportionality, let's give a clearer
15 definition of what that would mean and, then,
16 some level of flexibility around it?

17 DR. YOW: I am because if you do
18 it this way, you still get the heart of the issue
19 for the walk-ons, but you don't have to count all
20 of these, you know, averages of squad sizes and
21 do this and do that. I'm just looking for a way
22 to get at meeting several of the needs, improving
23 the situation for women, capping -- not capping --
24 helping the walk-ons at least to the variable of

1 seven percent. If it's true that men do walk-on
2 more readily than women, then, we're going to
3 have some wiggle room there to allow that to
4 occur.

5 There are those kinds of things
6 that are happening. It's simple. It's more
7 simple. It's easier to understand. The public
8 would actually understand it, I think, which would
9 be a benefit.

10 MR. LELAND: Okay. Rita?

11 MR. SPANIER: Let me just -- I have
12 one small thing. I'm sorry, Rita.

13 DR. SIMON: Oh, sure.

14 MR. SPANIER: Let me just point out
15 you keep saying 50/50. We heard from the athletic
16 director of the Air Force Academy in Colorado
17 Springs, 15 percent -- I think it was 15 percent
18 of the cadets are women.

19 In many of the land grant
20 universities, while nationally, it might be
21 53 percent women and 47 percent men at many of
22 our land grant universities because they have
23 thousands of students in engineering and
24 agricultural and so on, you know, it's actually

1 the other way around. So 50/50 as a starting
2 point isn't -- conceptually, I understand what
3 you are saying, but you really have to take some
4 other things into account.

5 DR. YOW: I hear that and I do
6 think, though, that we have to be careful not
7 to use, like, Georgia Tech Air Force Academy,
8 the engineering type schools, because there
9 are so few of them now and the land grant --
10 Maryland is a grant. We are 52/48, moving
11 to 51/49 right now. Whether or not there is
12 a mechanism, Jerry, for people who are obviously
13 disadvantaged, I think that that could be done.

14 MR. LELAND: Okay. Let's take
15 questions, Rita and then Jerry.

16 DR. SIMON: Debbie, this is a
17 question. I'm intrigued with your idea of let's
18 start out at 50/50, but I'm curious as to how
19 you determine how much variance for different
20 universities. Do you determine the variance, then,
21 on the basis of enrollment? Do you determine
22 the variance, then, on the basis of walk-ons?
23 How do -- do you determine the variance, then,
24 on the basis of interest or prior participation?

1 Because it seems to me that
2 with the variance of up to seven percent, you
3 are going to cover almost all of the universities
4 and colleges in this country. Obviously, not the
5 Air Force Academy, but I don't think you're going
6 to find many universities that have a wider variance
7 than 43/57, for example. So that it's very
8 important to determine how much of a variance
9 at different schools and on what basis.

10 MR. LELAND: Okay. We need quick
11 questions and quick answers because we need to
12 move through.

13 DR. YOW: I have no empirical
14 statistical data to support the variance of
15 seven percent. It's based just in my years
16 of -- 26 years of just dealing with this and
17 how it feels on this side when people quit and
18 change.

19 DR. SIMON: But would you have
20 some university with a variance of only two
21 percent? Would you have some universities
22 give a variance of seven percent? I'm asking
23 just to push out your idea.

24 DR. YOW: No. I adhere to the

1 principal of equal and fairness.

2 MR. LELAND: Okay. We've got
3 four more questions and then we'll have to move on.
4 Cary?

5 MS. GROTH: Debbie, I have a
6 question regarding the institutions, if we
7 eliminate the flexibility of prongs two and
8 three, which I think you are suggesting, and
9 just have proportionality starting at 50/50
10 with a variance, are you not concerned that
11 many institutions would continue to drop or
12 accelerate the dropping of men's Olympic sports
13 to get to that proportionality with your
14 recommendation?

15 DR. YOW: No, because I think
16 with the seven percent variance, you have
17 enough of a variance for the majority. I
18 don't have the empirical data, but it's just
19 my observation that it would be enough to
20 not cause that to happen and in addition to
21 that, provide opportunities for those walk-ons
22 in the wrestling teams and those kind of things.

23 MR. LELAND: Okay. Gene?

24 MR. DeFILIPPO: Debbie, I have

1 come not to pummel you, but to praise you.
2 You mentioned some great things; enrollment,
3 differentials, walk-ons, more scholarships
4 for women. I still think that all of those
5 things need to be taken into consideration,
6 but if OCR will provide us with clear and
7 consistent policy guidance by, among other
8 things, issuing a new written policy statement
9 keeping this -- these issues which you spoke
10 about and those which Graham spoke about and
11 others that are to follow, I think all of this
12 is going to take care of itself.

13 DR. YOW: I'm fine with that.
14 I'm looking for an opportunity to redefine
15 that prong one and provide a greater degree
16 of flexibility for the walk-ons.

17 MR. LELAND: Okay. Julie?

18 MS. FOUDY: This seven percent
19 variance, the worst case scenario you gave was
20 53/46. When you talk -- so you're not talking
21 about seven percent off of 50 where it could
22 be 43/57?

23 MR. LELAND: I think she is talking
24 about 50 percent -- you start at 50 and you allow

1 a seven percent variance. That would be 43 percent
2 female.

3 MS. FOU DY: That's really a 14 percent
4 variance.

5 DR. YOW: Yes. We need to -- being
6 an English major...

7 MR. LELAND: I think she said -- to
8 speed this up, I think you said they start with
9 50/50 and then you give variance from there, not you
10 start with the enrollment ratios and give variance
11 from there, but please clarify.

12 DR. YOW: Yeah. I don't think I can
13 clarify it. I'm actually open to discussion about
14 either one, to be candid with you.

15 MR. LELAND: So the issue is a
16 set standard with some flexibility, a set standard
17 that's universal with some flexibility.

18 DR. YOW: With measurable flexibility.

19 MR. GRIFFITH: Okay. The question is
20 what's the swing?

21 DR. YOW: I understand the question.
22 I'm just over here thinking about it because I did
23 give the example of 53 and 47, which is a seven
24 percent variance, but then the question was asked

1 about going in the other direction and I said I
2 wasn't sure and I'm not sure. It's an open ended --
3 it's a question. I just know it needs to be
4 something that's measurable.

5 MS. FOU DY: Because --

6 MR. LELAND: Okay. One or two more
7 questions and then we need to move. Go ahead.

8 MS. FOU DY: Just the one comment of
9 from what we have heard from athletic directors
10 that once you get to this, whatever the standard
11 if you set the standard, that's what we are going
12 to get to. 50/50 becomes less of an issue and it's
13 okay. What's my biggest margin of error that I
14 can get to? Essentially, depending on the variance,
15 you are setting it at 43/57 instead of 50/50.

16 DR. YOW: Right. So you're saying
17 that you could perhaps see it, Julie, if the
18 variance of seven percent meant 53 -- as an example
19 53 percent for women and 46 percent for -- 53 for
20 men and 46 percent for women, but not that wide a
21 variance?

22 MS. FOU DY: I'm just saying the
23 principal of 50/50, I understand.

24 DR. YOW: Yes.

1 MS. FOU DY: But in reality, what
2 would end up happening, they would go to --

3 DR. YOW: I acknowledged that.
4 I acknowledged that whatever the variance would
5 be, that's where -- that's where a number of
6 institutions would go as a ceiling and I'm
7 saying to you that even if that happens, there
8 would be vast improvement for women in sports.

9 There would be a number of
10 institutions -- and Maryland is not alone, that
11 we're not going to do that. We're not alone.
12 We're not unique. There are a number of ADs
13 around this table, as a matter of fact, who
14 would never allow that to happen.

15 So it would happen some. It
16 would still make it better nationally than
17 anything we've ever dreamed about for women and
18 there would be a number of us that wouldn't even
19 allow that to happen on our campuses.

20 MR. LELAND: We've got one more
21 question. Bob, do you have a question?

22 MR. BOWLSBY: Debbie, just so I
23 understand what you are proposing, you would
24 be talking about a base of 50 percent --

1 50/50 participation-wise and also 50/50
2 scholarship-wise?

3 Would those same two variances
4 be in place in both because you had mentioned
5 the walk-ons? Would the only variance be available
6 in walk-ons or would that scholarship variance, in
7 your vision, also be present?

8 DR. YOW: In my vision, there
9 would be the variance available for both because
10 of the issues of people transferring in both male
11 and female.

12 MR. BOWLSBY: Okay.

13 DR. YOW: We don't know when
14 that's going to happen or kids that quit teams
15 or academically become ineligible, you know, it
16 happens all throughout the year.

17 MR. BOWLSBY: Thank you.

18 MS. COOPER: I have a quick question.
19 Would that variance be different for participation
20 as opposed to scholarships?

21 DR. YOW: As I presented it, Cynthia,
22 no. It would be the same. It would be seven
23 percent although there was a question about what I
24 meant by seven percent.

1 MR. LELAND: Okay.

2 DR. SIMON: I just want to say I
3 think that's a very interesting idea, Debbie.
4 I think that it loosens things up sufficiently,
5 that it gives enough opportunity to handle
6 special problems and we're not stuck with strict
7 proportionality. I think it's a very interesting
8 idea.

9 DR. YOW: Why, thank you, Rita!

10 MR. LELAND: Okay. Other thoughts and
11 comments?

12 DR. YOW: I'll pay you later!

13 DR. SIMON: Good!

14 MR. LELAND: Julie?

15 MS. FOU DY: I just have problems
16 with the variance issue and the fact that you are
17 creating a situation that is essentially unequal
18 and we need to be very cautious about that.

19 DR. YOW: Julie, just hang onto this
20 thought. You're not going to get everything you
21 want. Compromise, compromise, compromise. Think
22 of this, if it were seven percent as you described
23 it, how would you feel about it? Not the 14 percent
24 thing, but --

1 MS. FOU DY: I think the variance is
2 still too large.

3 DR. YOW: Oh, my. Okay.

4 MR. LELAND: Okay. I think there
5 is enough support that we could pass this on
6 without taking a show of hands and at least ask
7 the staff to clarify and work with Debbie on the
8 issues that have been brought up so when we come
9 back in January, we're clear. Thank you again.
10 Cary?

11 MS. GROTH: My turn?

12 MR. LELAND: Yes, ma'am.

13 MS. GROTH: I have actually two
14 recommendations that kind of go hand-in-hand.
15 Is that okay? They kind of trail a bit.

16 MR. LELAND: Well, let's say we
17 have one with two parts.

18 MS. GROTH: Okay. One with two
19 parts.

20 MR. LELAND: That way, we can feel
21 more comfortable.

22 MS. GROTH: Consistent education
23 and enforcement of Title IX by the Office for
24 Civil Rights and that goes hand-in-hand with

1 what Gene had recommended with the enforcement
2 and then also piggybacking on what Graham had
3 said about the safe harbor, to eliminate the
4 safe harbor would, in fact, allow the opportunity
5 for those three tests to be looked at equally.
6 If we were to do that, and I would encourage us
7 to redesign the EADA report so that it does not
8 only list the proportionality as the prong one
9 because that's the perception and it encourages
10 the perception that that is the only prong that
11 is a safe harbor.

12 MR. LELAND: Okay. Comments and
13 questions for Cary? That was a nice one with
14 three or four parts, but that's okay.

15 MR. SPANIER: Yes. I have one
16 comment. I think, you know, for opening up
17 the discussion of the EADA report, where does
18 the mandate from that come from by the way?
19 Was that an act of Congress or was that something in
20 your --

21 MS. STROUP: It's statutory. The
22 requirements for EADA and the actual specific
23 line items that get reported are all reported --
24 are all part of the -- they are in the Higher

1 Education Act. So it's statutory. It takes
2 an act of Congress.

3 MR. SPANIER: The one that's up
4 for renewal right now?

5 MS. STROUP: Yes. That's right.

6 MR. SPANIER: So this is very timely?

7 MS. STROUP: This is very timely.

8 MR. SPANIER: Does the Higher
9 Education Re-Authorization Act include specifics
10 like, you know, financial data and things like
11 that? Is it that specific or did the department
12 decide what should go into the 30 or 40 or 50
13 pages?

14 MS. STROUP: I would say, Graham,
15 some of it is through regulatory process, but
16 a lot of it is very specific if you read the
17 statute. It really says, you know, assistant
18 coach numbers, salaries, men, women, I mean,
19 it's very specific when you look at the
20 legislation.

21 MR. SPANIER: Because I think since
22 you brought this up, I guess my comment is -- I
23 mean, I like the idea of taking a look at the act,
24 but I think we should really encourage that it be

1 taken a look at, not just do we add a box that
2 says we are following prong three.

3 I have not met an athlete yet
4 who has ever looked at those data. I mean, our
5 country is spending a lot of money and staff time
6 getting that up on the web and as far as I know,
7 the only -- I mean, there is just a handful of
8 people who look at, a couple of them like Welch
9 here in the audience taking notes and, you know,
10 they do something with it, but I've never met an
11 athlete yet who actually looked at it.

12 So my suggestion would be if
13 we're going to take a look at it, let's redo
14 it so it's a report of maybe a few pages with
15 relevant information that somebody might be
16 actually interested in looking at.

17 How Boston College pays for
18 the medical costs of its student athletes,
19 whether it's coming out of this budget or that
20 budget, whether it's listed under this category
21 or that category, is completely irrelevant to
22 a public reporting, but there may be some other
23 things that aren't in there that actually might
24 be kind of interesting sort of as a consumer

1 oriented bit of information.

2 Anything that we could do to
3 cut down on unnecessary paperwork, unfunded
4 mandates, staff time, hundreds, collectively
5 tens of thousands of hours of effort to fill
6 out reports that nobody ever looks at is just
7 a colossal waste. So I would say let's take a
8 fresh look at the EADA.

9 MR. LELAND: Let's --

10 MS. STROUP: Could I say one thing?

11 MR. LELAND: Yes.

12 MS. STROUP: You now stole my
13 recommendation although I was going to actually
14 frame it in two ways and say one consideration
15 is to recommend to the Secretary that he support
16 the repeal of it and get rid of it all together.
17 A lot of what you said is true. People don't
18 use it. We don't use it for any purpose at all.
19 We literally pay a contractor to load it to the
20 web site and stick it up there.

21 Half of the time, we don't
22 know if the data is right. I mean, we have no
23 way of knowing if you are reporting the right
24 numbers. The Department of Education, we would

1 never be able to tell. We have to take your
2 word for it that you are actually giving us
3 good data.

4 If what everyone says is true,
5 and I have no reason to doubt you, half of
6 it is irrelevant and not comparable across
7 institutions so I don't know what value it has.
8 You are right, it is costing everybody a lot
9 of time and effort.

10 My second point of that was
11 going to be if I don't want to vote for repealing
12 it, we need to fix it, and make it something
13 that has some value to people. It is a consumer
14 disclosure product for us. I mean, it's in the
15 law as a consumer disclosure issue. That's why
16 Congress adopted it. We use it as that purpose.
17 It's part of a consumer disclosure issue for us.

18 MR. LELAND: Well, Cary, would you
19 accept the possible elimination of it as a friendly
20 add-on to yours?

21 MS. GROTH: No. I would prefer that
22 we not eliminate, but --

23 MR. LELAND: Okay.

24 MS. GROTH: -- that we do what Graham

1 suggests, that we look, we revise it and we make it
2 an appropriate document that people can use and are
3 using.

4 MR. LELAND: Revise and appropriate to
5 the three prongs, correct?

6 MS. GROTH: Uh-huh.

7 MR. LELAND: Okay. Then we still --
8 if you want to make your -- Julie, do you have a
9 question?

10 MS. FOUDY: That's fine.

11 MR. LELAND: Okay. Other thoughts
12 and questions on, really, the two-part
13 recommendation that Cary has made? We'll skip her
14 next time around! No, just kidding.

15 MS. COOPER: We'll go to Percy.

16 MR. SPANIER: Put both
17 recommendations. I mean, since -- you know, a lot
18 of the things that are on the table so far like what
19 Debbie has done and some of the others, we can't
20 vote everything up in January because some of them
21 are in conflict.

22 MR. LELAND: Correct.

23 MR. SPANIER: So why not have --
24 you know, let's keep it grossly amended, but let's

1 eliminate it and then we'll have to lean one way or
2 another on it.

3 MR. LELAND: Yeah. I think when
4 Cynthia and I talked about the procedures, we --
5 last night for today's meeting as we move forward,
6 I think we understood there would be contradictory
7 proposals at this time that we would ask the staff
8 to write up and we'll try to settle those
9 contradictions, if we have to, at the January
10 meeting, but let's not squelch anybody's ideas
11 as long as there is some support from other
12 commissioners for what is suggested.

13 So I think, Graham, we anticipated
14 what you are talking about and think that's probably
15 perfectly appropriate to have a little bit of
16 contradiction here. Any other thoughts on Cary's?

17 Okay. Percy?

18 MR. BATES: Thank you. I could
19 actually say ditto to Gene and Graham, but since
20 I have five minutes, I don't want to waste it.

21 Unlike Debbie, I guess I want to
22 put in a pitch for prongs two and three. I think
23 we have heard people complaining about the safe
24 harbor and how they got there and feeling forced

1 into it and asking for some flexibility and I guess
2 I think that two and three actually provides that
3 kind of flexibility.

4 By way of my top recommendation,
5 it seems to me that we need to look very carefully
6 at this legislation and provide clear and
7 understandable structures and guidelines for
8 implementation.

9 Now, certainly a lot of this focus
10 might be on prongs two and three to make them, of
11 course, more workable entities, but we've also heard
12 that we need to do something as well with clarifying
13 prong one.

14 We have heard repeatedly that
15 there essentially has been only one viable prong
16 and, of course, that being number one, but prongs
17 two and three, in my view, are very viable and it
18 should, of course, be an integral part in the
19 implementation of this legislation.

20 It seems to me we've heard part
21 of the reason why some people may or may not have
22 been in compliance is that the rules and regulations
23 were not clear, the communication was not
24 necessarily clear. I think we need to make every

1 effort to make sure that those who go in to examine
2 and those who have to participate all understand
3 what is being asked of them. It seems to me we've
4 heard that there is some lack of communication on
5 that.

6 Now, once we have that level of
7 clarity, then, I think we must talk about stronger
8 sanctions for failure to comply because I'd like to
9 get rid of the notion that if I understood better,
10 if it were clearer, I might be in compliance. I
11 think we need to make it absolutely clear that there
12 is no way that one can misinterpret what is being
13 asked of them.

14 Now, once we have that, and that's
15 when I go to the second level to talk about -- now,
16 I'm willing to talk about sanctions and believe me,
17 if there are no sanctions, there is no reason to
18 require anything because it's not a requirement if
19 there are no sanctions. So out of all of this,
20 we've got to come up with a way, it seems to me, to
21 say if we're going to put the work into getting you
22 to understand what it is, once we understand it, if
23 you don't now do it, then, there will, in fact, be
24 some clear sanctions for it.

1 So that's my top recommendation
2 and I hope Debbie agrees that we ought to hang onto
3 two and three a little bit longer.

4 MR. LELAND: It seems to me that
5 there's two -- sort of two new ones besides the
6 dittos and that was strong support for two and three
7 and then strong support for some kind of sanctions
8 program based on criteria of some kind.

9 MR. BATES: Correct.

10 MR. LELAND: Let's discuss those, if
11 you agree, Percy, those are the -- sort of the gist
12 of your thoughts.

13 MR. BATES: Right. Those are the two
14 issues.

15 MR. LELAND: Let's have conversation
16 on those two issues; strong support for two and
17 three and the sanctions issue. Any thoughts?

18 MS. FOUDY: Can I just add one detail
19 to, I think, both Cary and Percy's points about one
20 of the things that I had recommended was including
21 athletic closure letters to universities and high
22 schools and junior high schools so that they
23 understood, you know, how this university has
24 complied and how this one has or this school and

1 the sharing of more examples for better
2 understanding?

3 MR. LELAND: Uh-huh. Yes?

4 DR. YOW: I appreciate and agree with
5 Percy's emphasis on enforcement given our 30-year
6 history here with no -- with being sanctioned as
7 threatened, but I would like to say that I think
8 that that also lends itself to having standard that
9 is objectable, easily understandable so that it can
10 also be easily enforced.

11 MR. BATES: That's all implied in what
12 I was saying.

13 MR. LELAND: Yes.

14 MR. BATES: Do one and then the other.

15 MR. LELAND: Okay. Other -- Rita?

16 DR. SIMON: I just want to say that
17 I think the issue of sanctions is very important,
18 Percy, in areas that I have done a great deal of
19 work. The absence of the enforcement of sanctions,
20 which were written into the law has made the law
21 meaningless.

22 For example, on transracial
23 adoption, there is a law that was passed, I helped
24 get it passed, race should not be a factor in

1 adoption. The sanction was if states violate that,
2 then, federal funds are withheld, but it's not been
3 enacted at all and, therefore, it's the same old
4 business as unusual. There has been no change.
5 Really, race is taken into account in most
6 instances.

7 Another area is sexual trafficking.
8 We had a law passed a few years ago, which did
9 provide some sanctions and that has so far really
10 not been operative.

11 Unless you have sanctions, I think
12 the meaningfulness of the law will not be workable.

13 MR. LELAND: All right Great. Other
14 thoughts or concerns? Okay. Thank you, Percy.
15 Sally?

16 MR. BATES: Did I use all of my five
17 minutes?

18 MS. STROUP: I'll go back to mine
19 since I'm the one who has gotten beat up over EADA,
20 you know, by Graham for the past day and a half and
21 just say again the reason I -- I would just at least
22 consider recommending eliminating it is because I
23 worry about what we are using it for. I listen to
24 all of you talk about it at these things and I

1 listen to the people who testified about it and
2 it seems to me people are looking at the EADA report
3 that we post on the web and say this is some
4 accurate picture that we should use to judge whether
5 or not someone is in compliance with Title IX. No.
6 That is not correct. We do not go back and audit
7 that information.

8 I know from experience and from
9 talking to people that lots of athletic directors,
10 they just sort of pass it around and figure out what
11 the numbers should be and send it to us. We post
12 it. That's what we are supposed to do with the
13 information. We do not sit there and go back and
14 audit, recheck and say is this right or is this
15 wrong.

16 If you are using it to judge
17 somebody, you are using it for an incorrect purpose.
18 That's just not what we do with it. So it worries
19 me that you talk about fixing it. I don't know how
20 you fix it. All I'll say is I've actually looked at
21 this because I have to worry about reauthorizing the
22 Higher Education Act and so it's on my list of
23 things to do, and I have gone through some of the
24 reporting and said how are you going to change this

1 to ensure to anybody out there that it's actually
2 accurate information? I don't know how we do that.
3 It is very complicated. It's 40 some pages long.
4 We ask you every nit known to man about what's going
5 on at the athletic department.

6 Again, it's statutory -- most of
7 that is statutory. Don't get me wrong, it's not
8 because anyone at the Department of Education in the
9 past has decided that's the way it should be done.
10 I think it is something worth considering. Maybe
11 it's scrapping it and proposing something else that
12 everyone can agree to that is information that has
13 some value, that you want the department to have on
14 its web site and use for disclosure purposes mainly
15 for students making decisions on choosing colleges.

16 But this is one that I just see
17 people using it in a way that it's not intended. We
18 have other web sites that do this. We post all of
19 your costs at your colleges. That's on our web
20 site. That's good disclosure information. You
21 can't really fudge those. People know what your
22 tuition is. They know what you are charging. It's
23 in your handbook.

24 On this one, I don't feel we get

1 the same level of accuracy. That's what worries me
2 about trying to do this kind of reporting. So I
3 would again at least advocate that you consider
4 proposing support for eliminating it.

5 MR. LELAND: Okay. Thoughts and
6 questions?

7 My concern about eliminating it
8 is, first of all, maybe we need to eliminate and
9 reinvent it, but I think a lot of us would -- sort
10 of the gist of the testimony I've heard and what
11 I've heard from commissioners is they would like to
12 have some public acknowledgment not only of prong
13 one, but prong two and prong three. You know, the
14 only way to do that right now is the ADA form.

15 So maybe it's a different kind of
16 form, but I think there is a concern that university
17 presidents would like a way to have a public
18 acknowledgment of their compliance with Title IX.
19 That's why, you know, somebody like Cary or myself
20 would think, gee, let's put prong two and prong
21 three on the EADA report.

22 Maybe we need to eliminate the
23 EADA report and have something come out of a whole
24 different branch of the Department of Education that

1 deals specifically with Title IX compliance and has
2 the right kind of signatures.

3 MS. STROUP: Just remember, this
4 is a reporting mechanism. You simply transmit
5 information to us and we'll put it up there, you
6 know, no matter what you would decide that
7 information should be. Again, we are not ensuring
8 that it's accurate information. That's not part of
9 the process.

10 I don't know exactly how you do
11 two and three in a new web environment of reporting.
12 It's one thing to have a 40-page data thing because
13 we can just plug up the data. We just fill the
14 fields with your information. Trying to do an
15 explanation of how you are complying with something
16 is a whole other issue that would have to be
17 resolved if you go down that road, but I understand
18 what you are saying.

19 MR. LELAND: Okay. Graham?

20 MR. SPANIER: Well, just to your
21 point, Ted, the NCAA has -- requires its members to
22 do a rather massive amount of reporting on this and
23 other issues as well. So by eliminating the EADA,
24 we, in the NCAA, have decided nevertheless to do

1 certain kinds of reporting and, you know, I have no
2 doubt that if we eliminated the EADA as a federal
3 mandate, that the NCAA and its members would still
4 decide what kinds of information it wanted to put
5 out and that is a voluntary association governed
6 by its members.

7 I'm just not worried about the
8 elimination of that because the key things that we
9 all wanted -- the NCAA is so historically committed
10 to a level playing field and, you know, sharing
11 certain kinds of information so we all know we are
12 in the right zone, I don't think that's the case
13 that if we eliminated that through the Higher
14 Education Reauthorization Act that we would be left
15 with no public information about how we're doing on
16 a number of things.

17 MR. LELAND: Okay. All right.
18 Anything else? Julie?

19 MS. FOUDY: I don't claim to be an
20 expert on the EADA at all, but from what I have
21 heard, and Graham has said that he doesn't know
22 of a student that's looked at it, I heard there is
23 some value to it in terms of looking at different
24 numbers and figures. I know there is some inherent

1 problems with it that clearly need to be addressed,
2 but I would be against eliminating it because I
3 think it does serve a purpose.

4 MR. LELAND: Okay. Other comments?
5 I feel some support for this so we should pass it
6 forward to the staff. Brian?

7 MR. JONES: Actually, I'm going to
8 defer on this round. Imagine that, a lawyer with
9 nothing to say!

10 MR. LELAND: Okay.

11 MR. JONES: Percy can have my five
12 minutes if he'd like. I'll defer. Thanks.

13 MR. REYNOLDS: Ditto.

14 MR. LELAND: Julie, are you ready?

15 MS. FOU DY: I'm shocked, Jerry.

16 I keep coming back to this arm's
17 race issue, but I see it as central to what we are
18 discussing and I don't mean that we are going to
19 eliminate football or basketball or anything like
20 that, but I think that we can all agree that there
21 is a problem with excessive expenditures at the
22 collegiate level and resources and the fact that we
23 have a finite pie has become a major issue in many
24 decisions on whether you are keeping teams, cutting

1 teams, whether you can add a team.

2 So it always comes back to the
3 resource issue. My recommendation deals with that.
4 I know -- I agree with Bob that, you know, this
5 isn't the place to figure out how we are going to
6 address that, but I think we need to make some sort
7 of strong recommendation that this is a huge issue
8 that could help alleviate some of the problems
9 associated with Title IX.

10 So my recommendation goes
11 something like this: The Department of Education
12 should encourage educational institutions and
13 national athletic governance organizations to
14 address the issue of reducing expenditures in
15 intercollegiate athletics on a national level.
16 Having adequate financial resources is more likely
17 to contribute to the retention of participation
18 opportunities for the over-represented gender and
19 the expansion of opportunities for the
20 under-represented gender.

21 MR. LELAND: Okay. Did you guys
22 write that down? She read it a little fast. I'm
23 just kidding! Hopefully, we'll get a transcript.
24 Let's discuss it.

1 MR. SPANIER: Well, I'm very
2 supportive of having that recommendation, but
3 let me just tell everybody that I have had the
4 experience of being on the witness stand for
5 several hours in one of the nation's major antitrust
6 cases that resulted in a judgment of tens of
7 millions of dollars against the NCAA because I
8 was chairman of the board, Division I board of
9 directors, at the time.

10 While I'm very supportive of that
11 recommendation, I think that group needs to discuss
12 this at another level because implied behind that is
13 the question of whether this Commission would want
14 to urge the Secretary of Education being an advocate
15 for and the Bush administration being an advocate
16 for some limited antitrust exemption for
17 intercollegiate athletics.

18 The idea of curtailing the
19 arm's race in athletics really comes down to
20 those categories of expenditures that while not
21 necessarily unique to intercollegiate athletics,
22 are very profoundly at the heart of the arm's race
23 of intercollegiate athletics.

24 Salaries and employee benefits in

1 athletics has a preponderance of costs in personnel.
2 It's a very people intensive business. Things like
3 travel, which are a big part of our budgets because
4 we are flying our athletes all around, we have
5 nothing to do there other than to alter our
6 schedules or to pay whatever the escalating travel
7 costs are.

8 But the NCAA -- to the extent
9 that there are limitations and expenditures, the
10 NCAA is only able to provide limited support there
11 in certain categories like you can only have 13
12 scholarships in men's basketball and that is
13 considered to be an acceptable limitation. But
14 there are other categories of expenditures that
15 universities in the NCAA have been unable to
16 legislatively control because of antitrust concern.

17 So I support that recommendation,
18 but I think it's important to take a minute to go a
19 step further and to ask whether it's a part of that
20 recommendation or a separate one.

21 Does this Commission want to ask
22 the Department of Education or the administration to
23 explore that limited antitrust exemption for
24 intercollegiate athletics? That's probably, in

1 my opinion, what it's going to have to -- I mean,
2 other than some unknown level of internal discipline
3 where we all wink at each other and say, no coach
4 should be paid more than a million dollars or
5 whatever we would wink at each other, but we need
6 to address that issue, I think.

7 MR. LELAND: Tom?

8 MR. GRIFFITH: You are going to be
9 deposed again if you keep talking about winking at
10 each other. That wink would be illegal.

11 MR. SPANIER: Well, I'd love your
12 comments on this as A, as a general counsel and B,
13 as a former legal counsel for the Senate.

14 MR. GRIFFITH: I think you are right.
15 If the Commission decided that there was something
16 the law could do about the arm's race, I don't think
17 there is any question, we've discussed this many
18 times before, that you need to get an exemption from
19 existing antitrust laws, which make it illegal right
20 now for college presidents to agree among themselves
21 to restrict the salaries that they pay to their
22 coaches. That is against the civil and criminal
23 laws of the United States today. That would be a
24 really significant recommendation.

1 I, for one, would not favor it
2 for a whole host of reasons, but I think Graham is
3 right, that's at the heart of that. The only way
4 the law could get at that issue is by changing the
5 law in a very fundamental way. Now, it's done --
6 it's done for major league baseball. Let's
7 recognize that it's not unprecedented, it would --
8 that's what it would take to do that.

9 I, for one, wouldn't favor it
10 because generally speaking, I'm in favor of what the
11 marketplace is and I think efforts to restrict the
12 marketplace generally, as history has shown, doesn't
13 work very well. I'm not certain there isn't a role,
14 however, for the Secretary of Education or the
15 President or whoever, to use a bully pulpit to talk
16 about, you know, how colleges and universities ought
17 to properly spend their money. I think that's a far
18 cry from the other alternatives. This would require
19 major revisions of the law.

20 MR. LELAND: Julie?

21 MS. FOUDY: I think there is a few
22 different levels here. That antitrust exemption is
23 one, which I think if you put it in light of the
24 fact that we're talking about universities when the

1 principal goal is to educate instead of be a
2 professional athletic organization, then, I think it
3 sheds a different light on it.

4 I think the second thing is you
5 have -- you have other expenses that many people
6 have talked about as panelists that have come in
7 with testimony about a 300-page color brochure, a
8 night before games and hotels, and that -- we know
9 it's not as expensive to keep a wrestling team or
10 a swimming team when it's a couple hundred thousand
11 dollars and looking at and tweaking budgets in a way
12 where you do it across the board where it's not just
13 one school at a time where you are mandating across
14 the board so it's not affecting the competitive
15 balance is something that's another level, I think,
16 that should be addressed and recommended because
17 it's not going to impact the performance of their
18 team necessarily or their entire athletic program,
19 yet it has the potential of saving many men's teams,
20 which brings us here essentially.

21 MR. LELAND: Okay. Debbie?

22 DR. YOW: Julie, it's an idea that
23 has been discussed for years and years and years.
24 It's called cost containment and we run through

1 these cycles in the NCAA where we define the number
2 of colors on stationery that people can have and in
3 those big brochures, which pages can be color versus
4 which ones have to be black and white. So just
5 know --

6 MS. FOU DY: I know that. I know that
7 it's been discussed. My issue is that it's never
8 been taken to the next step where it's just gone
9 from discussion to let's enact something that
10 actually causes these universities to do more cost
11 containment.

12 DR. YOW: Good luck.

13 MS. COOPER: Rita?

14 MR. LELAND: Rita?

15 DR. SIMON: I just want to say that
16 there -- we have data that shows there is a strong
17 relationship between improvement in the educational
18 performance and the standards of -- scholarship
19 standards of universities and how well their
20 athletic programs are.

21 Living in the Washington D.C.
22 area, I've seen two very dramatic examples of that.
23 As the athletic programs have gotten better and as
24 their teams do well, you get better students

1 applying to the university. We have perhaps more
2 prestigious faculty members wanting to be members
3 of that university so that there is a very strong
4 relationship and some coaches who may get more than
5 a million dollars probably deserve it because they
6 are doing other things besides building a strong
7 sports program.

8 They are, in fact, enhancing the
9 overhaul prestige of the university. I always tell
10 the president of my university go out and buy a good
11 basketball team if you want to enhance the
12 university!

13 MR. LELAND: Rita, I'm appearing
14 before the faculty senate at Stanford. We'd love
15 to fly you out for that little comment if you could
16 tell our faculty there that.

17 I think there seems to be enough
18 support to move this forward at least into the next
19 phase.

20 MR. BATES: But in what form? I guess
21 I want to -- because I think we have heard about
22 three different formats; the bully pulpit, the --

23 MR. SPANIER: Well, I would be very
24 comfortable just supporting that as you wrote it and

1 then asking the staff to think about a separate one
2 as kind of an adjunct that deals with this legal
3 side of cost containment issue.

4 I'm not sure, like Tom, if I
5 support it, you know, what I would support in that
6 area myself, but I think it is naive if we don't
7 put that out there as an important issue that
8 somebody has to face up to and talk about.

9 MR. BATES: Yes.

10 MR. SPANIER: Otherwise, just talking
11 about cost containment, you know, as Debbie said, I
12 mean, the NCAA has already passed rules that are
13 designed to contain about every imaginable cost that
14 can be contained that doesn't get you into legal
15 trouble trying to contain.

16 MR. BATES: Yes. Ted, I guess I just
17 wanted to simply add that it's pretty clear. I
18 think Bob called it a train wreck about to happen
19 somewhere down the road and this is an area where we
20 have to do something.

21 I guess I believe that we are not
22 going to be able to somehow police it ourselves
23 because it is an arm's race. If Ted is going to do
24 it, we're going to do it, Gene is going to do it and

1 it keeps going and we are not going to stop it.

2 If it's going to be stopped, it
3 has to be from an entity that's out -- that's
4 someplace -- that's somehow outside of the current
5 arena. I think we have to decide whether we want
6 to really take it on while at the same time
7 recognizing anything softer than some sort of
8 antitrust exemption, no matter how minimal, that
9 is probably the only way if we are looking for some
10 realistic change in this area that we are going to
11 get it.

12 MR. LELAND: Gene? Then, we will move
13 on.

14 MR. DeFILIPPO: I definitely think
15 that these are issues that we need to look at, but
16 I would like to ask are we in athletics a whole lot
17 different than the rest of our campuses? I mean,
18 we're all competing for the very, very best
19 students.

20 Go on any of our campuses and
21 you'll see new construction and renovation. We've
22 all found that the way to gain a legal edge in
23 getting the great students to come to our
24 institution is provide job placement upon graduation

1 and to have great facilities. In all of our
2 campuses, we're competing for the best students.

3 I don't see athletics doing
4 anything that's any different than that. We're all
5 paying what we can pay for the best professors in
6 certain areas. We're trying to get the best
7 coaches. We're trying to have nice venues in which
8 our student athletes can play. I don't see that
9 we're doing a whole lot different than what the rest
10 of the campuses are doing.

11 MR. LELAND: Okay. Other comments?
12 Bob?

13 MR. BOWLSBY: I think this is a good
14 discussion and it's one we've had -- it's been a
15 recurring theme over the -- throughout our hearings.
16 I think we are all coalescing around some ideas, but
17 it probably is also appropriate to interject that
18 the -- while we have talked about facilities and
19 salaries and a number of our areas of escalation, on
20 my campus, and I think that probably it's consistent
21 across most of our country right now, is the area
22 where we have the fastest escalation in baseline
23 costs is in tuition and fees, room and board.

24 That's because of difficult

1 economies throughout our country and because
2 institutions -- at the University of Iowa, our
3 tuition and fees went up 18 percent last year and
4 19 and a half percent this year. I don't have
5 another area of expenditure within my program that's
6 going up anywhere close to those rates. You know,
7 that's -- for me, the escalation in cost and the
8 train wreck we've talked about is only tangentially
9 involved in the issues of equity.

10 It has -- it affects our program
11 from stem to stern and it's not going to go away
12 around equity issues any more than it's going to go
13 away around any other single aspect of expenditure
14 within our program.

15 We have some very serious funding
16 problems in athletics and in higher education in a
17 larger context. So for us, tuition and fees and
18 room and board is escalating a lot faster than the
19 two percent salary increase we had last year.

20 MR. LELAND: Okay. Other thoughts and
21 comments on Julie's recommendation?

22 Okay. Hearing none, Tom?

23 MR. GRIFFITH: I have a substantive
24 recommendation and then I have a process one that

1 would apply to all of them, but fearing that the
2 chairman may not let me get to the second one, let
3 me do the first one, the substantive one.

4 It's a simple one and that is,
5 it comes out of the discussion we had late yesterday
6 about strict proportionality versus substantial
7 proportionality. My recommendation would be that
8 if substantial proportionality is retained, and I
9 think there is a political will to retain
10 substantial proportionality, I think everyone
11 agrees that it has achieved some significant measure
12 of success, that if substantial proportionality is
13 retained, that the OCR clarifies what substantial
14 proportionality means and we move away from the
15 regime we have now, which, for many colleges and
16 universities, is, I think, better described as
17 strict proportionality.

18 If it's really one percent, if
19 we have OCR regional offices that are interpreting
20 it as diminimus or one percent, I think it needs
21 to -- there needs to be more flexibility and that
22 we need to capture a better idea of what is
23 substantial proportionality. I think it at least
24 has a common sense meaning and I would go in the

1 range of what Debbie is talking about.

2 I would say seven to nine percent.

3 Something in that range is more akin to substantial
4 proportionality than the regime right now, which I
5 think is better described as strict proportionality.
6 So I would say that substantial proportionality
7 should be clarified to be in the range of seven to
8 nine percent.

9 MR. LELAND: Variance versus whatever
10 population measure we use?

11 MR. GRIFFITH: Yes, that's right, yes.
12 I'm talking about affecting the numerator. I'm open
13 to the other suggestions about what the denominator
14 ought to be, but I'm saying if you took it right now
15 where the denominator is student enrollment, and I'm
16 not necessarily in favor of that, but if you took it
17 right now, at the very least, there ought to be the
18 variance of seven to nine percent because that's
19 more of what substantial proportionality means than
20 what we have right now, which is strict
21 proportionality.

22 That leads to my other
23 recommendation.

24 MR. LELAND: Is it short?

1 MR. GRIFFITH: It will be short.

2 Whatever recommendations the
3 Commission makes that we recommend, that whatever
4 policy OCR goes forward with, that it takes either
5 the form of a proposed statute or takes the form of
6 a proposed regulation. Now, I -- here's why I think
7 that's important. I'm going to read from the
8 Constitution of the United States.

9 Article I, Section 7, it's called
10 presentment clause, says every bill which shall have
11 passed the House of Representatives and the Senate
12 shall, before it becomes a law, be presented to the
13 President of the United States. If he approves, he
14 shall sign it.

15 Article II, Section 3 of the
16 Constitution, the take care clause, says that one
17 of the responsibilities of the President is that
18 he shall take care that the laws be faithfully
19 executed.

20 Now, that's the way we make laws
21 in the United States of America. Without following
22 that process, a bill that's presented to the House
23 and the Senate, signed by the President, and then
24 faithfully executed by the President, unless you go

1 through that process, in our system, it does not
2 have the force of law because it's not a product
3 of this very careful political process that was
4 designed by the framers to make certain that all
5 people had a chance to participate in the making of
6 the law.

7 If you look at the history of
8 Title IX, Title IX itself was a product of that
9 process. The 1975 regulations are a product of
10 that process because the take care clause describing
11 the President's responsibility includes his
12 responsibility through his administrative agencies
13 to propose regulations that have the force of law.

14 But the 1979 policy interpretation
15 was not done that way. It does not have the same
16 force of law that the statute itself and that the
17 regulations have. Now, so what? Is this just a
18 lawyer's argument? No, I think it makes a
19 difference here because in the 1979 policy
20 interpretation, as it has been used by some OCR
21 regional offices, something has happened that
22 contradicts what the framers of Title IX made
23 clear they never wanted to have to happen. They
24 never wanted Title IX to be used as a quota system.

1 I don't think there is any
2 question, but the way that some of the regional
3 offices of OCR have interpreted the enforcement of
4 the 1979 policy interpretation has lead -- has lead
5 to quotas in some cases.

6 Well, I think that's an example
7 of why whatever the Department of Education does,
8 it needs to be done with the force of law. I think
9 the Department of Education either needs to go and
10 suggest that Title IX itself be amended and
11 clarified, passed by Congress to take into account
12 these issues we are talking about right now or that
13 the Department of Education go through the
14 rulemaking process that's created by statute, but
15 failing to do that, I think, creates a product that
16 does not have the force of law and my experience has
17 been that the process is a great safeguard to avoid
18 aberrant interpretations that order people's lives
19 in a way that really doesn't have the force of law.

20 So that's my speech for why I
21 think whatever we do, we ought to recommend the
22 Department of Education either propose a statute,
23 which I actually would not be in favor of, or
24 propose regulations, which is what I would propose.

1 MR. LELAND: Okay. Let's --
2 substantial proportionality, there are two
3 suggestions by Tom.

4 Is there any discussion on
5 the issue of clarifying the idea of substantial
6 proportionality as opposed to what Tom said was
7 strict proportionality. Let's do that one first
8 and then we'll get to the second one.

9 MS. GROTH: Okay. Tom, let me -- I'm
10 not in favor of the range.

11 MR. GRIFFITH: Okay.

12 MS. GROTH: Let me tell you why.
13 Prongs two and three, if we're not -- if we are
14 not offering equal opportunities, then, there are
15 two other prongs that we can use and I go back to
16 we would make prong one more like a prong two or
17 prong three if we were to do what you suggest.

18 Further, if we take Graham's
19 suggestion in getting rid of the safe harbor and
20 enforcing all three prongs equally or equitably,
21 I think it would take care of the issue that we've
22 heard so often regarding proportionality in the
23 first prong.

24 Again, I think it's worth

1 repeating if we're not offering equal opportunities,
2 we still have two other prongs that will put us into
3 compliance.

4 MR. GRIFFITH: See, I would quarrel --
5 you are equating equal opportunities with strict
6 proportionality. I think that's a new idea. That's
7 not one that I would necessarily agree with. All
8 I'm suggesting is the phrase that has been used
9 since at least 1979 is substantial proportionality.

10 How did that get to mean one
11 percent? If we -- you know, if we were to go up
12 to people on the street and say, here's the phrase,
13 substantial proportionality, what do you think that
14 means? I'd betcha virtually no one would think that
15 the common meaning of that is a one percent
16 variance.

17 That's really all I'm saying.
18 If we're going to keep substantial proportionality,
19 and I think we should, it ought to be more flexible
20 than that. Now, maybe we ought to move to some
21 other regime such like Debbie is talking about.
22 Maybe we should start with a different baseline,
23 50/50, and move from there. I think that's really
24 another way of getting at the same issue that I'm

1 talking about.

2 MR. LELAND: Let's stick with this
3 substantial proportionality.

4 MS. FOU DY: To expand on that, to
5 me, it's more an issue of education, about what
6 substantial is, and the fact that -- I mean, the
7 fact that yesterday, we pretty much illustrated
8 the example of no one knowing what it is and
9 everyone here is involved in that business directly
10 and yet we didn't know if it was five percent or
11 one percent or three percent. So the issue of
12 education is clear, that that needs to be enhanced.
13 Rather than changing what we have, let's make sure
14 everyone knows what we have.

15 DR. YOW: Julie, one of the problems
16 is this; if you're going to call it substantial
17 proportionality and then say it's plus or minus one
18 percentage point, let me just say to you that's a
19 target we cannot hit because we don't know who is
20 going to transfer, we don't know who is going to be
21 academically ineligible, we don't know who is going
22 to get pregnant and not be able to play, that
23 happens a lot now, they can't play that season, we
24 don't know who is going to say they didn't get

1 enough playing time and they are transferring to
2 university X. All of those things are happening to
3 us all of the time. There is no wiggle room with
4 the one percent.

5 MS. FOU DY: This is why we have the
6 Cantu letter. The paragraph we found yesterday,
7 which we were asking about, it talks about -- and
8 I'll read directly from the 1996 clarification
9 letter, it says, however, because in some
10 circumstances, it may be unreasonable to expect
11 an institution to achieve exact proportionality,
12 for instance, because of natural fluctuations in
13 enrollment and participation rates or because it
14 would be unreasonable to expect an institution to
15 add athletic opportunities in light of the small
16 number of students that would have to be
17 accommodated to achieve exact proportionality,
18 the policy interpretation exam is whether
19 participation opportunities are, quote,
20 substantially proportionate to enrollment rates.
21 Because this determination depends on the
22 institution's specific circumstances and the
23 size of its athletic program, OCR makes its
24 determination on a case-by-case basis rather

1 than through use of a statistical test.

2 DR. YOW: Yes. And case-by-case means
3 that you now are involved in -- you're always having
4 to prove where you are, get your attorneys involved,
5 create documents and if we're going to do that, it
6 shouldn't be called substantial proportionality.
7 It should be strict proportionality. Let's call it
8 what it is.

9 MS. FOU DY: But I think we can't
10 forget the reason behind Title IX is for the
11 athletes. You need some type of analytical form
12 to look at. If you don't measure up to the
13 analytical side of it, then, you have prongs two
14 and three to go to show why your numbers aren't
15 substantially proportionate.

16 DR. YOW: I think one of the
17 interesting things Cary said was in the use of
18 two and three, those prongs that -- I think she
19 talked about being equitable. It's not equitable
20 in the sense that it's -- you don't even know who
21 is going to review that. Who reviews it has
22 everything to do with what the outcome might be.
23 That's why I'm looking for something that's easily
24 understood, a target that can be hit that provides

1 some true substantial proportionality, which is what
2 Tom's recommendation does. Now, I don't agree with
3 nine percent, but that's another issue. The
4 concept, I believe, is right on target.

5 MS. FOU DY: Right.

6 MR. GRIFFITH: The number, I don't
7 know.

8 MS. FOU DY: And I --

9 MR. LELAND: You can't go back, Julie.

10 MS. FOU DY: No?

11 MR. LELAND: Let's go to Graham first
12 and then we'll give you another chance.

13 MS. FOU DY: Oh, okay.

14 MR. LELAND: Now, I just have one
15 question. Do you want seven percent or nine percent
16 in your motion or do you want just substantial
17 proportionality?

18 MR. GRIFFITH: Let's say seven
19 percent.

20 MR. LELAND: Okay.

21 MR. GRIFFITH: Nine is -- you're
22 probably right. Seven would be --

23 MR. SPANIER: Well, I'm not sure what
24 the right numbers are, but I think we have already

1 all agreed, almost all of us, perhaps, have agreed
2 that we need some -- there needs to be some further
3 clarification of these terms of proportionality --
4 substantial proportionality and strict
5 proportionality and to the extent that that all has
6 to be rewritten, there has to be some guidance given
7 either through words or numbers what that means.

8 So I think your recommendation
9 has some merit with whatever the number would turn
10 out to be or some description in words of what the
11 general objective is.

12 I'll give you the example
13 at Penn State last year, we were one point some
14 percentage points off and I said to my athletic
15 director, I would like to be within one percent by
16 this fall. That was my charge to him. Be within
17 one percent. We were close last year and there were
18 some reasons he had why it was off.

19 Well, he came in sheepishly at
20 the beginning of this year with the report, very
21 apologetic, I think he maybe thought I was going to
22 fire him or something because he was at 1.3 percent.
23 Well, there were a couple of women on the basketball
24 team who transferred or didn't come back eligible or

1 something. I can't remember what all the details
2 were, but there were about a half a dozen people who
3 had an individual story, which collectively added up
4 to three-tenths of a percent.

5 He thought we were going to be
6 within one percent and then the summer is over and
7 the athletes come back, you know, I don't know, some
8 have this problem, that problem, some didn't come
9 back at all, and there you've got it. I mean, it's
10 sort of what you've described and so, you know, here
11 I was trying to get the athletic department to
12 achieve a particular number and we didn't get there.
13 So we need to have -- there needs to be some real
14 life understanding and flexibility.

15 What it is, I'm not sure, but I
16 think your suggestion has merit because what you
17 are really saying, Tom, is we've got to have some
18 clarification of what those terms mean and what the
19 objectives really are and if it's a number, come up
20 with a number whether it's seven or nine or five or
21 whatever. You know, pick your number.

22 MR. LELAND: Okay. Rita and then
23 Julie.

24 DR. SIMON: All I want to say, in

1 other words, we need operational definitions. When
2 we talk about substantial proportionality, we need
3 numbers. When we talk about expansion, when we talk
4 about sanctions, we need to put in some operational
5 definitions. Verbal terms may not be enough on
6 these things.

7 MR. LELAND: Okay. Julie, did you
8 have more?

9 MS. FOUDY: I just think we need to be
10 careful. It's a civil rights law. When we put in
11 numbers and variances, the nature of it is you're
12 going to go to the point of least resistance.
13 You're going to go to that number. So, in essence,
14 you are creating an inequality with these numbers
15 and we can look at the variance level we're going
16 to choose or we're going to recommend, but I think
17 we need to be very careful because it is a civil
18 rights law and you are tampering with equal
19 opportunities.

20 MR. LELAND: Yes, Tom?

21 MR. GRIFFITH: You don't have any
22 water that you're going to throw on me when I
23 respond to that, do you?

24 I think that you're right to be

1 concerned about that. I think the safeguard there
2 we should never forget is if there is intentional
3 discrimination, that's illegal. We're not talking
4 about cases where it's clear that people are being
5 discriminated against. If that's going on,
6 regardless of the numbers, that's wrong and that
7 can be redressed.

8 What we are talking about
9 now is when you don't have clear, intentional
10 discrimination, what are your guidelines? In that
11 way, Title IX is far more protective of any possible
12 civil rights interest than any other statute. So I
13 want to be clear that you're right. If someone has
14 that seven percent variance here and yet it can be
15 shown that they are intentionally discriminating
16 against female athletes, under this proposal, they
17 still get nailed, as they should.

18 MR. LELAND: Okay. Any other
19 components on this substantial proportionality?
20 Brian?

21 MR. JONES: No.

22 MR. LELAND: Okay. I think there is
23 enough support, it seems, to move that forward.

24 Let's talk about the second part

1 of our question here and that's in terms of the
2 process that we'd ask -- that we'd suggest that the
3 government would follow if and when they decide
4 to interact -- you know, reevaluate and relook at
5 this whole issue.

6 Does anybody have any questions
7 for Tom about that? None of us are quite up to
8 snuff on the whole -- okay. Let's -- we will pass
9 that. Go ahead.

10 DR. YOW: I've got a question for you.

11 Tom, if it were a regulation,
12 which I think is Congress versus a statute, which
13 is OCR -- that's wrong?

14 MR. GRIFFITH: No. Actually, the
15 regulation would be --

16 DR. YOW: That's wrong? It's the
17 other way around. Thank you.

18 MR. GRIFFITH: -- with the Department
19 of Education and --

20 DR. YOW: You can tell that I don't do
21 what you guys do for a living.

22 MR. GRIFFITH: No, that's fine.
23 That's fine.

24 DR. YOW: If it were Congressional in

1 nature, it would appear on the surface to a lay
2 person that that takes a lot of time to implement
3 versus --

4 MR. GRIFFITH: That's why I wouldn't
5 recommend that, but --

6 DR. YOW: -- doing it through the
7 Office of Civil Rights.

8 MR. GRIFFITH: Which is what my
9 recommendation would be.

10 DR. YOW: Okay.

11 MR. LELAND: Do you want that part of
12 your recommendation, Tom?

13 MR. GRIFFITH: Yeah, let's make it
14 that way.

15 MR. LELAND: Okay.

16 MR. GRIFFITH: But the significance
17 here -- let me -- the significance here, for
18 example, we've been talking about substantial
19 proportionality a lot. Well, that phrase isn't
20 found anywhere in the statute. It isn't found
21 anywhere in the regulations and yet that's the
22 standard by which literally tens of thousands of
23 lives are affected. Well, that bothers me.

24 I think whatever happens going

1 forward, it ought to have the force of law and
2 shouldn't be the result of a process that's decided
3 by -- excuse me -- don't be offended by this -- but
4 by bureaucrats who are largely immune to the
5 political process.

6 MR. LELAND: However cheerful they
7 are.

8 MR. GRIFFITH: Yes.

9 MR. LELAND: Okay. Any other
10 questions on Tom's second point?

11 Okay. Rita?

12 DR. SIMON: It's nice being this far
13 along because I was able to learn so much from
14 everybody else's suggestions. Actually, mine are
15 going to be a composite.

16 First of all, I want to comment
17 on the work of a fellow who I think is a potential
18 Nobel prize winning economist and that's Thomas
19 Sowell and Thomas Sowell always makes the point that
20 not all imbalances, not all differences indicate
21 discrimination. I think that's very important.

22 For example, in all of our town
23 meetings, and among all the people on our panel, I
24 haven't heard anyone say it's discriminatory not to

1 have a women's football team. There are some
2 differences. Now, maybe we should have a women's
3 football team, but so far, I haven't heard anyone
4 suggest that.

5 Okay. So let's keep that in mind
6 and look at some of the issues. One, on the matter
7 of proportionality, I think Debbie Yow's suggestion
8 of starting out at 50/50 and then allowing a
9 variance and spelling out what that variance should
10 be, seven percent, nine percent, but have that
11 included in what we mean by 50/50 plus the variance,
12 that it would be up to -- it would be the discretion
13 of the universities to activate, I think if we do
14 that, then, I think it would be very useful to use
15 the surveys that I'm still advocating, interest
16 surveys and prior participation surveys, to
17 understand how to make prong three stronger.

18 What, in fact, are the interests?
19 Well, now, we'd have some hard data and we could
20 look at these regularly performed surveys to see how
21 interests change, how participation rates change and
22 so forth. So I would say we use the substantial
23 proportionality in the sense of 50/50 plus variance
24 and then we go on and include surveys and use

1 surveys for -- to better understand the importance
2 of prong three.

3 Then it seems to me we have
4 to spell these criteria out very carefully to
5 all the universities so they all understand.
6 They start out at 50/50 and then they have that
7 much discretion and then they will be expected
8 to have survey data that they can refer to in
9 terms of measuring interest and measuring likely
10 participation rates because if you don't have
11 those criteria very clearly spelled out, then,
12 you can't get to my last point, which is I think
13 we should have sanctions.

14 I think that we should indicate
15 to the universities when these sanctions will begin,
16 how they will be enforced and so forth. If you have
17 all of these regulations and you don't have any
18 sanctions, it's often business as unusual. So I
19 think what I am suggesting 50/50 with operational
20 definitions, a variance, use surveys to get at
21 interests and that enhances prong three, be very
22 clear to spell out these criteria so all the
23 universities know what the rules are and then
24 institute sanctions.

1 MR. LELAND: Okay. I -- it seems
2 to me that most of those points, which are very
3 articulate, are sort of subsumed in what other
4 people's --

5 DR. SIMON: That's exactly right.

6 MR. LELAND: -- sort of support what
7 other people said.

8 Does anyone want to comment on
9 that? I don't see any new proposals from Rita, but
10 does anybody want to comment on any of them before
11 we move forward? Thank you, Rita. Bob?

12 MR. BOWLSBY: Thank you.

13 MS. COOPER: Muffet? Are you there,
14 Muffet?

15 MR. LELAND: Muffet, are you there?

16 MS. McGRAW: Yes, I am.

17 MR. LELAND: Oh, it's your turn.

18 MS. COOPER: It's your turn.

19 MS. McGRAW: Okay. There has been
20 a lot of great stuff that I already have on my
21 recommendations as well so I'll just try to find
22 the one thing that nobody has mentioned.

23 With -- regarding the
24 proportionality prong, my recommendation was that

1 we use the traditional aged student rather than the
2 student enrollment as a general number thinking
3 that -- I read something that said about 45 percent
4 of the college students were really only the ones
5 that were at college age. So there's a lot of women
6 that are being counted that aren't or maybe should
7 not be counted in the student enrollment.

8 Along with that, I also agree that
9 we need to have a variance. My number, I thought,
10 less than five percent. I thought seven was a
11 little high. So I wanted to go with less than five
12 percent. That's it.

13 MR. LELAND: Okay. Questions?

14 DR. YOW: I have a question.

15 MR. LELAND: There are two proposals
16 there. One is to change the seven percent that we
17 are sort of carrying to five. We again said we
18 would entertain contradictory proposals, too, that
19 seems to me to be within the fair game.

20 The other one, which is new,
21 is keeping proportionality, but looking at
22 traditionally aged students as opposed to all
23 students, is that correct, Muffet?

24 MS. MCGRAW: That's correct.

1 MR. LELAND: Questions?

2 DR. YOW: Hi, Muffet. This is Debbie.

3 A question for you, if it were restricted and you
4 took out the non -- quote, unquote, nontraditional
5 students, however they end up being defined, how
6 often do you see that measurement being taken
7 because I just -- I was just curious about that.
8 I'm not opposed to it. I'm just thinking ahead to
9 the implementation of that. Would it be every four
10 years? I mean, what cycle would you see that? What
11 form would that take?

12 MS. MCGRAW: Well, by traditional, I
13 just meant age. So I don't know that you have to --
14 to do it in any certain amount of time. It would
15 just -- the college age would be 17 to 22.

16 DR. YOW: Well, you have to measure
17 it, though. If you're going to measure it for
18 ratios, male to female, I mean, are you suggesting
19 you measure it every single year? If you measure it
20 every single year, how do we stay in compliance
21 because that's a moving target year-to-year?

22 MS. MCGRAW: I don't know about that.
23 I guess I would say every four years just going with
24 the cycle of the college students.

1 DR. YOW: Okay. Thank you.

2 MR. LELAND: Any other questions?
3 Julie?

4 MS. FOU DY: How, right now, does NCAA
5 define a student that's eligible to participate in
6 athletics and if a student falls out of that
7 definition or that criteria, are they counted in the
8 percentages?

9 MS. MCGRAW: I'm not sure. Can
10 anybody else answer that one?

11 MR. LELAND: Well, the easy answer to
12 the question is it's about 25 pages in the NCAA
13 manual about eligibility versus ineligibility. I
14 mean, it's really complicated.

15 MS. FOU DY: Uh-huh.

16 MR. LELAND: And we did have testimony
17 from the people at Cal Now settlement in California
18 that said they used NCAA eligible --

19 MS. FOU DY: Right.

20 MR. LELAND: -- which I took to mean
21 enrolled for 12 students, you know, full-time
22 students. I didn't take that to mean they were --
23 that the University of California was going through
24 eligibility requirements for all their hundreds of

1 thousands of students. So when he said NCAA
2 eligible, that's what -- but NCAA eligibility is
3 very complicated and it has to do with --

4 MS. FOU DY: Because -- I'm asking
5 because I believe I read somewhere, and I don't know
6 where, because we've read so much, but one of the --
7 I think it was one of the clarification letters
8 about Title IX or from a civil rights person about
9 the issue of your student body being counted off
10 the NCAA eligibility requirements and if that is,
11 in fact, the case, then, that solves the problem
12 of non-traditional students and the second part to
13 that being is I again see this as an issue of
14 education because prong three deals with this in
15 that you have heard from junior colleges that their
16 non-traditional students are not interested because
17 of that, they are working mothers or for whatever
18 circumstances, they fall under the prong three
19 criteria.

20 MR. LELAND: Okay. Bob?

21 MR. BOWLSBY: As I understand it,
22 the OCR has a description or definition of
23 non-traditional students.

24 Could you share that with us,

1 Jerry?

2 MR. REYNOLDS: Well, there are at
3 least two definitions. At OCR, I believe we use
4 full-time undergraduate students. That's what we
5 look at. So we don't count graduate students. We
6 don't count part-time students.

7 But with respect to the definition
8 of -- well, there is a second definition of the
9 traditional student that some component within the
10 Department of Education has. I don't know which
11 component, but there is -- the department does have
12 a definition of the traditional student.

13 MR. LELAND: So what you are saying is
14 there is a definition already out there? It's not
15 necessarily used in today's computations for
16 proportionality? You don't know? You just know you
17 have a definition, correct?

18 MR. REYNOLDS: I'm sorry. Could you
19 repeat that?

20 MR. LELAND: Well, the question was is
21 there a definition for traditional students and you
22 said yes, there is.

23 MR. REYNOLDS: Yes.

24 MR. LELAND: I don't think that's

1 applied right now to our formulas as it relates to
2 this issue in front of us and what Muffet is
3 suggesting is that we apply that.

4 MR. REYNOLDS: Yes. There is a
5 definition in one of the -- one of the components of
6 the department has a definition of a traditional
7 student and I forget -- it includes age, it includes
8 the number of credits.

9 MR. LELAND: Cary?

10 DR. SIMON: It says right here
11 full-time undergraduate.

12 MR. REYNOLDS: Well, that's not the
13 one that I'm referring to. That is the -- OCR
14 currently uses that as a standard, all full-time
15 undergraduate students, but that doesn't speak to
16 the issue of traditional student versus
17 non-traditional student.

18 MS. GROTH: Ted, my --

19 MR. LELAND: Yes, Cary?

20 MS. GROTH: My question is with
21 regards to variance issues and it really goes to
22 Tom, Rita, Muffet and even Debbie. I think we need
23 to clarify this before we have staff work on some
24 of these recommendations and maybe you have and I

1 just -- it's gone over my head, but when we talk
2 about five percent variance, are we talking about
3 52?

4 If we are using 50/50, just as
5 an example, are we talking 52.5, 47.5 or are we
6 talking, you know, 60 -- 55 to 45? I mean, there's
7 a huge difference and I don't think we ever cleared
8 that up. Maybe we did when Debbie talked about it,
9 but I think we need to decide on that. I want to
10 go on record that I'm uncomfortable even with five
11 percent, but we do need to clearly define what that
12 variance means before we move forward.

13 MS. MCGRAW: I was talking about a
14 difference of five percent.

15 MR. LELAND: Say that again, Muffet.

16 MS. MCGRAW: Just a difference of five
17 percent so it would be 50 to 45.

18 MS. FOU DY: No, no.

19 MS. GROTH: So it's at ten percent.

20 MS. FOU DY: It would be your first
21 one, right?

22 MR. SPANIER: Five percent for
23 proportionality.

24 MS. MCGRAW: 52 to 47, I guess it

1 would be.

2 DR. SIMON: Fifty-two and a half to
3 47.

4 MS. GROTH: Okay.

5 MS. FOU DY: Yeah.

6 MR. LELAND: And is the seven
7 percentage, would you -- Tom, in yours, would you
8 identify it the same way, the differences between
9 the percent of -- go ahead.

10 MR. GRIFFITH: What I thought it
11 meant, but I'm open, I'm not wed to this, is that a
12 seven percent variance would allow at the maximum 57
13 and 43. That's what I --

14 MR. LELAND: Okay. So we've got that
15 as Tom's.

16 MR. GRIFFITH: Isn't that what
17 variance means? I mean, I don't -- I mean, I may be
18 wrong.

19 MS. FOU DY: So 14 percent
20 essentially.

21 MS. GROTH: Yes, 14 percent.

22 MR. LELAND: Do you understand? I
23 mean, it could be seven percent versus --

24 MR. GRIFFITH: I understand.

1 MR. LELAND: -- the 50 percent female
2 enrollment or it could be the difference between
3 male percentage of athletes and female percentage of
4 athletes.

5 MR. SPANIER: There's a difference
6 between a variance and a range.

7 DR. SIMON: Right, right.

8 MR. GRIFFITH: Yes.

9 MR. SPANIER: If we've looked at
10 proportionality in the past being the ratio to
11 full-time undergraduate students and you are
12 somewhere where it's 52/48, then, your variance
13 from proportionality would be if it was one percent,
14 it would be one percent either way. So a variance
15 is your variation from proportionality or 50/50 or
16 whatever I want to call it. The range is when you
17 talk 14, that's not the variation. That's the total
18 range within which it could fall.

19 MR. GRIFFITH: Okay. Then I misspoke.

20 MR. SPANIER: And the ranges don't
21 really apply anyway because everything that's ever
22 been written on this has been written in terms of
23 the variation for the under-represented group so to
24 talk about another seven percent on the other side,

1 nobody has ever said that's a problem.

2 MS. MCGRAW: Well, I didn't go to
3 Notre Dame. I just work here. I'm going to leave
4 that part to you guys.

5 MR. LELAND: But let's try -- let
6 me try to make it clear. If you have a -- if you --
7 just as a hypothetical, if you have 50 percent
8 female enrollment at your institution and you are
9 required to be within substantial proportionality,
10 it means a variance of five percent, that means you
11 must have -- 45 percent of your student athletes
12 must be female.

13 That's the way we all interpret
14 both of these numbers, both the seven percent and
15 Muffet's five percent as we go forward. Is that
16 okay? Then we can always change your mind on what
17 the number is, but let's agree on how we sort of
18 calculate the numbers, if we could do that.

19 Are we okay?

20 DR. YOW: And that's -- according to
21 what Graham said, that's a variance, not a range.

22 MR. BATES: That's a variance and not
23 a range.

24 MR. SPANIER: Because on the plus

1 side, it's irrelevant. There is no -- that's not
2 an issue. Nobody is against having historically
3 under-represented individuals at some point being
4 over-represented and I think there was one or two
5 universities in the country that were on the flip
6 side.

7 MR. LELAND: Yeah.

8 MR. SPANIER: There were only, like,
9 five that were within one percent anyway or that
10 were cited.

11 MR. LELAND: Okay. More conversation?
12 Muffet had two. One is sort of a substitute
13 recommendation, which would be a five percent
14 variance on proportionality and the other was within
15 asking the Department of Education to look into
16 using the comparison data of traditionally aged
17 students or traditional students. We identified
18 there is a definition out there somewhere for that.

19 Yes, Julie?

20 MS. FOU DY: I think my point was that
21 are we not already using this definition taking them
22 into account, the non-traditional, because they are
23 not eligible for NCAA activities or sports.

24 MR. LELAND: No. I think the EADA

1 report, when you compute the number of full-time
2 students, doesn't deal with NCAA eligibility issues.
3 It's the number of full-time equivalency is what it
4 is, I think. Go ahead.

5 MS. GROTH: Well, and the age
6 discussion really depends on the divisions and
7 the associations. You know, it's not the same.
8 Division I is different than the other divisions
9 and NAIA. So I don't think we can use -- in junior
10 colleges, I mean, you can have your rowing example.
11 Those women could participate at the junior college
12 level at 40 years old. You know, I think we're
13 going to get ourselves in a little bit of a bind if
14 we use age as a criteria or in that case because it
15 is different. It's not consistent.

16 MR. LELAND: Yes, Rita?

17 DR. SIMON: I just think
18 overwhelmingly, if you use the term full-time
19 undergraduate students, you are talking about
20 students between the ages of 17 and 22. Yes,
21 there are some variations, people who come back
22 to school full-time as undergraduates after they
23 have raised the family or they've done some other
24 things, but overwhelmingly, I'm sure well over 90

1 percent of full-time undergraduate students are
2 between 17 and 22 years of age.

3 MS. MCGRAW: I don't know if I agree
4 with that. Do you have data that supports that?

5 DR. SIMON: I can find it. I don't
6 have it at the tip of my fingers here.

7 MS. MCGRAW: I don't know if it was
8 full-time, but I read that 45 percent were college
9 age students.

10 MR. LELAND: Well, Muffet, would you
11 take as a friendly amendment to your -- that they be
12 some kind of -- you ask the Department of Education
13 between now and January to look into some definition
14 that might be handy of traditional students --

15 MS. MCGRAW: Yes.

16 MR. LELAND: -- that might be a cohort
17 to measure the percentages against as opposed to
18 just what we're doing now?

19 MS. MCGRAW: Right. I agree with
20 that.

21 DR. SIMON: It's in the Handbook of
22 Statistics. We can get it.

23 DR. YOW: Ted, can I say one thing?

24 In '99/2000, we did a survey

1 ourselves. We had a person at each of the schools
2 that finished in the top 25 for the Sears Cup.
3 We did an analysis of -- based on their -- the
4 proportionality prong as it currently stands, who
5 was -- how far off they were both in participation
6 proportion and scholarship proportion and ten of
7 the 25 met the seven percent variance, only ten of
8 the 25.

9 So I just want to say, Julie, if
10 it were seven percent, you're still going to see
11 improvements of significance even among the elite
12 institutions. Now, this is two years ago. This is
13 two years old. I knew it was two years old because,
14 Graham, you were close even then. You were only
15 2.09 percentage points off in your participation
16 rates. So it makes sense that they closed the gap
17 on that since then.

18 But it is -- it is -- it's a kind
19 of a mix. You're afraid there are not going to be
20 enough opportunities and Bob referenced a point that
21 would be shared by many, which is, it's too tight.
22 There is too much -- I mean, there are loads of
23 people that are so far out of compliance, it will
24 take a long time for them to get there and that goes

1 to Jerry's point what kind of structure would you
2 put to allow people an opportunity to get there.
3 But it would, just so you know, significantly
4 improve throughout the ranks opportunities for
5 women.

6 MR. LELAND: Okay. Since we've got
7 two of Muffet's suggestions or recommendations on
8 the table, is there anybody who wants to object to
9 asking the staff to move forward with those?

10 Okay. I think what we'll try --
11 what Cynthia would like to do is have one more and
12 then we'll break for lunch. We'll have one more.
13 Last, but not least, Bob?

14 MR. BOWLSBY: I am willing to go after
15 lunch, if you'd like.

16 MR. LELAND: No, no. Let's go now,
17 please.

18 MR. BOWLSBY: I have the burden and
19 benefit of going last, but I have been particularly
20 struck throughout by some of the things Tom has had
21 to say and his recent comment was certainly an
22 example. I think he is exactly on target. Earlier,
23 I alluded to it. He stated it better.

24 The only thing etched in stone

1 about anything of this is those 37 words in the 1975
2 regulations and as we peel away from our own various
3 ways the layers to try and get at how we fix this or
4 how we strengthen it, I think we all agree we want
5 to make it better for women and better for men and
6 more understandable and quantifiable for the
7 institutions that are involved, but I guess I've
8 been kind of impressed by how well this morning has
9 gone. I thought that there might be a little more
10 acrimony than there has been.

11 Having the opportunity to go last,
12 I hesitate to throw in anything more that's going to
13 confuse the issue out here, but I do think that I've
14 got a -- perhaps it's a friendly amendment that kind
15 of blends prongs two and three a little bit and, I
16 think, goes to Debbie's position that was stated
17 earlier. That would be simply to look for a way to
18 incentivize what we are doing with Debbie's proposal
19 and my idea -- and I have no particular pride of
20 authorship and this is sort of emanated out of what
21 I heard this morning would be to further amend prong
22 one of the three part test to identify the current
23 language as perhaps Item 1-A and to add an Item 1-B.
24 That addition would allow institutions to meet prong

1 one by offering participation opportunities equal
2 to, say, three percent more, three percent in access
3 of the actual participation of the under-represented
4 gender in the OCR region in which that institution
5 resides.

6 As I understand it, the OCR
7 regions are fairly well enunciated and I think this
8 would be a subprong of prong one, if you could call
9 it that, and unlike the earlier representation that
10 we've talked about, in my estimation, there wouldn't
11 be any variance allowed under this circumstance. It
12 would just be an additional way to get at and offer
13 institutions to meet the stipulations of prong one.

14 So basically, what they would have
15 the opportunity to do is draw upon OCR/Department of
16 Education statistics or some other agreed upon set
17 of data and they would have to offer more than what
18 is in the feeder system in order to -- in order to
19 encourage young women to get involved and to shoot
20 for that brass ring at the next level.

21 It would -- and I think, if you
22 look at the numerical aspects of it, you are
23 probably going to get in the same range of Debbie's
24 proposal with the variance that's been described and

1 this would just be another way to attack the problem
2 for institutions. Hopefully, it doesn't make it too
3 much more complex, but as I say, I think it's a way
4 to sort of blend the elements of prongs two and
5 three and at the same time, incentivize compliance
6 under prong one.

7 MR. LELAND: Okay. Questions?

8 MS. FOU DY: Explain that again, the
9 first part, 1-A. I didn't catch that.

10 MR. BOWLSBY: For instance, if you
11 would use my institution as an example, we're in --
12 I don't know what states are in the region of OCR
13 that we're in, whatever region it is, but some sort
14 of determination would be made, I guess, through
15 actual high school participation numbers, what
16 that -- what that percentage of participation is.
17 Maybe it's 43 percent female and 57 percent male.

18 Under that circumstance, an
19 institution could meet compliance with prong one
20 if they were offering 46 percent of their
21 opportunities that would include participation and
22 scholarships to the -- to -- in proportion to what's
23 in the feeder system. They would be using actual
24 participation numbers.

1 That goes back to Rita's example
2 of the last set of hearings, but it would
3 incentivize the growth of opportunities at the
4 collegiate level and the high school level because
5 there would be this percentage that was above and
6 beyond what the actual was for growth.

7 MS. FOU DY: I have a problem with our
8 assumptions because I think you are assuming that
9 the feeder level is equal and that we're not having
10 a problem with Title IX at the feeder level as well.
11 I think we recognize from some of the panelists and
12 what we have heard that that's not the case and that
13 there is inequality even at the feeder level. So to
14 base your numbers off participation numbers at high
15 school and then bring them to college, I think,
16 again, you are talking about freezing into place
17 that discrimination by bringing it on to the next
18 level.

19 I think that one of the things you
20 talk about, Debbie, is this significant --

21 MR. BOWLSBY: Before you go on, I
22 don't think it's been demonstrated that the
23 differential in the feeder system is a result of
24 discrimination. I think it's a result of perhaps

1 a lot of things and discrimination is probably one
2 of them in some circumstances, but I don't believe
3 we've heard any empirical evidence that that's due
4 to discriminatory factors solely.

5 MS. FOU DY: Well, you could look
6 at a lot of court cases that have been brought
7 forward saying that they don't have the same quality
8 of fields, same quality of coaching, et cetera,
9 funding at that grass roots level.

10 MR. BOWLSBY: Yes, but we're talking
11 about the numbers on this, the participation
12 numbers.

13 MS. FOU DY: Right. And I think you
14 could look at that as well because I just -- I have
15 a hard time with some of our assumptions because I
16 think we're assuming in a perfect world that all is
17 equal and we're not there yet. I wish we were. We
18 wouldn't need Title IX, but a lot of the things we
19 talked about are assuming that we're going to get
20 the spirit of the law that is -- that all things are
21 equal and we are not there yet.

22 You know, Debbie, you made the
23 point of it's a significant improvement and that it
24 should be a compromise because it's a significant

1 improvement, but that's not the spirit of Title IX.
2 It's not just about making significant improvements.
3 It's about equality. That's what civil rights laws
4 are about.

5 MR. BOWLSBY: Well, the letter and the
6 spirit is about nondiscrimination. It doesn't
7 reference equality.

8 DR. YOW: Right. And I think, Julie,
9 there is an important distinction that Bob is making
10 because we have heard from so many people.
11 I don't think anyone can present data to us to prove
12 that, you know, there is a specific number of women
13 who deserve this opportunity because it's all
14 floating out there with abilities and interests and
15 who wouldn't be interested in a scholarship, but
16 they are not interested necessarily in being the
17 walk-on of the team. So --

18 MS. FOUDY: And I'll use the word
19 nondiscrimination, but that's why we have prongs two
20 and three is that you can also show that as well
21 through these two prongs, that if you are not
22 meeting the equal access prong, then, you have two
23 and three to go to for nondiscriminatory purposes.

24 MR. LELAND: Cary?

1 MR. SPANIER: While I do share Bob
2 Bowlsby's -- I support what he is saying, I think
3 Julie has an important point. I'm not sure it
4 negates anything Bob is saying necessarily, but I
5 hope that the Commission, by the time we are done
6 with what we are doing, I hope we say something
7 about the feeder system, about high schools and
8 other opportunities we all happen to be centered and
9 focused on the collegiate experience, but again,
10 this is a case where when we get up to the
11 30,000-foot level and away from each individual
12 recommendation, we need to come out of this saying
13 something about that whole system of things that
14 leads up to the collegiate experience and just a
15 quick question, if you have the answer, what
16 proportion of the complaints that do come to OCR
17 are pre-college versus college?

18 MR. REYNOLDS: I don't have that
19 answer. I don't have that figure in my head.

20 MR. SPANIER: But is it fair to say
21 that a substantial amount of what we do -- what does
22 come to your attention is pre-college? We tend to
23 know about most of the university-related cases.
24 They get a lot of visibility and, you know, we are

1 aware of them. Frankly, it has not been a huge
2 amount, but I have heard about lots of high school
3 problems. I have the impression -- I mean, I'm
4 speculating, let's say, that it may be an even
5 larger number, thus, giving credence to what --

6 MS. FOU DY: And that's part of the
7 problem, though, Graham, is that we don't have a
8 system in place at that level, at the feeder system
9 level, to measure those numbers. We have the
10 National Federation of High Schools, which does a
11 state-by-state comparison of only participation
12 numbers.

13 There is nothing that gives
14 numbers financially. There is nothing that gives
15 the school by school measurement. And so we have
16 nothing to base that off of and the things you see
17 being brought to the courts are about funding issues
18 because you don't have anything that can look at
19 participation numbers. There is no system in place
20 right now for that.

21 MR. LELAND: Okay. Cary?

22 MS. GROTH: Bob, I would agree with
23 Julie. I think to add a measurement using a
24 foundation that's not fixed yet and could be

1 substantially different geographically depending
2 on the region where there is no uniform consistency
3 region-to-region would be very difficult.

4 For example, region five in which
5 we're at, Iowa, Illinois, parts of Wisconsin, could
6 have 45 participating females and 55 percent males
7 at the high school level. I'm just using that
8 hypothetically. However, a different region,
9 perhaps maybe in the Wyoming area or whatever, pick
10 a state, could be 30/70, 30 percent female, 70
11 percent male. There is so much inconsistency using
12 those percentages as a foundation with a system that
13 really has not been under the same scrutiny as
14 colleges and universities have to fix the problem,
15 that worries me.

16 MR. BOWLSBY: Well, except that to
17 not take that into account is to place all the
18 burden on the colleges and none of the burden on
19 anywhere else and it doesn't seem to me that that's
20 appropriate either. It's probably all right that
21 there is some variance among regions in the country
22 because that's-- you know, for the most part,
23 that's where we're drawing our students from and our
24 recruits.

1 MS. GROTH: And I do agree with you.
2 I don't think it's fair that all the burden or
3 publicity regarding Title IX is just solely going to
4 the colleges and universities. I think the
5 accountability level at the lower levels needs to be
6 much greater. So I agree with you.

7 MS. FOU DY: I think that speaks to the
8 issue that we need to work on something to help
9 enforcement at the lower levels because if we can
10 fix things there, then, it helps the colleges and we
11 have no system in place for that right now. That
12 seems to work.

13 MR. LELAND: Okay.

14 MR. BOWLSBY: After 13 presentations
15 and ideas, there's not much low hanging fruit left.
16 So I -- as I say, I have no pride of authorship on
17 this, but I did think that it was worth throwing up
18 and just talking about it a little bit.

19 MR. LELAND: Jerry?

20 MR. REYNOLDS: At the next meeting,
21 Graham, I'll bring in some figures on the breakdown
22 of complaints of colleges versus K through 12.

23 MR. LELAND: Okay. It would also be
24 nice, I think, if -- I'm assuming we're going to

1 extend Bob the courtesy we've extended to the other
2 commissioners by moving this forward.

3 There hasn't been any --
4 anything, I think, we've decided not to. So we're
5 going to move this forward, but I would like to --
6 a lot of how I would respond to this would be,
7 you know, based on what the numbers are.

8 In other words, if you told me
9 there were certain OCR districts out there where
10 there's only 25 percent of the females -- 25 percent
11 female participation in high school sports and
12 people could get by with 28 percent participation
13 at their school and meet prong one, I'm not sure
14 I'd be in favor of that, but if I find out that
15 there's, you know, 50 percent female participation
16 in OCR districts, so we may have to use somebody
17 else's statistics, but I'd like to know what the
18 sort of bottom line effect -- where this moves the
19 bar as a -- you know, in the different areas, just
20 a general impression. Yes?

21 MR. BATES: Ted, I just have a
22 question. Since I mentioned the issue of sanctions,
23 in thinking about that, there must be a reason why
24 in 30 years there have not been any and it makes me

1 a little uneasy to think that by simply saying in
2 the future there ought to be sanctions that it's not
3 likely to happen.

4 I guess just as a thought, is
5 there any way to think about bringing the NCAA into
6 this picture since we have a fairly effective way
7 of looking at these things and providing sanctions
8 like losing scholarships or something like that, the
9 notion of somehow withholding funds, it seems to me,
10 may not go very far.

11 As I've said, we have evidence
12 that in 30 years we haven't done that. I don't know
13 how we're going to get to doing it tomorrow, but I
14 think if we're going to be serious about the issue
15 of sanctions, we may think of some alternative ways
16 of partnering in this process in order to make it
17 work.

18 MR. LELAND: Okay. Let me just --
19 that's a little off. That's sort of a new subject,
20 but if you guys want to respond --

21 MR. GRIFFITH: Maybe we should go to
22 lunch.

23 MS. COOPER: Yes.

24 MR. LELAND: Let's get a response to

1 that and then we'll go to lunch.

2 MR. JONES: Sure. Just quickly, I
3 mean, there actually -- in the statute that created
4 the Department of Education, there are a range of
5 enforcement mechanisms that the Secretary has. I
6 mean, he's got a good deal of discretion with how he
7 enforces the statutes that are ours to enforce and,
8 you know, the termination of federal funds, of
9 course, is sort of the death penalty.

10 There are things, you know, the
11 more common things that we would see are things
12 like compliance agreements, cease and desist orders,
13 a whole range of things. So I think we could make
14 a recommendation to make greater use of the
15 statutory authority that he has now or we could
16 also think of recommendations that we might want to
17 ask the Secretary to pass on to Congress to revisit
18 our organizing statute.

19 MS. COOPER: Let's go to Bob and then
20 we'll break.

21 MR. BOWLSBY: Well, I just wanted to
22 add to what Percy said. You know, if the national
23 organizations are somehow involved in this, perhaps
24 we could look for ways to incentivize so that

1 institutions that are doing a good job could
2 participate in some positive way and I -- you know,
3 I -- we're always looking for penalties, but there
4 may be another way to get at it to make this a
5 positive thing.

6 DR. YOW: Percy, you're not suggesting
7 that the NCAA would do the evaluation on it?

8 MR. BATES: Oh, no, no, no, no, no.

9 DR. YOW: Okay. Thank you. You
10 scared me.

11 MR. PERCY: No, no. That was not what
12 I had in mind.

13 MS. COOPER: Okay. Let's break for
14 lunch. We'll come back at what, 1:00 o'clock, 1:15?
15 (Whereupon, after a short
16 break was had, the
17 following proceedings
18 were held accordingly.)

19 MS. COOPER: Okay. I think I'm going
20 to begin. I think we are going to go over to Tom
21 because he has a suggestion about the date of our --
22 for the date of our next meeting.

23 MR. GRIFFITH: I would -- given what
24 needs to happen between now and our next -- given

1 what needs to happen between now and our next
2 meeting, which is that the staff -- it was scheduled
3 to be on the 8th, which the staff is going to come
4 up with a report. The committee that's been chosen
5 -- Percy is on that committee and Donna and I think
6 Lisa, Rita and myself.

7 DR. SIMON: Lisa is not.

8 MR. GRIFFITH: Lisa is not on the
9 committee?

10 DR. SIMON: No.

11 MR. GRIFFITH: That, you know, we'll
12 need to take a look at it, get it in shape for the
13 next meeting, I don't -- and given the fact that
14 it'll be over the holidays, if there is flexibility
15 to do so, I would suggest that the next meeting be
16 moved back at least a week. It's scheduled now for
17 the 8th.

18 Another reason is our dear
19 colleague, Rita, is going to be in Cuba and won't
20 be back in time for the 8th. I think, you know, I
21 don't know what other people's schedules are like,
22 but if we could move it back a week, I think it
23 would be productive for everyone involved.

24 MR. LELAND: How does that fit with

1 our submission time line?

2 MR. DISKEY: Sorry, Ted. I forgot
3 about that microphone.

4 Well, as we discussed in San
5 Diego, whatever you submit on January 31st will
6 probably be in a basic word document that no matter
7 how quickly we move -- let me put it this way, you
8 would have to have the report nearly done now within
9 the next week or ten days in order for a designer to
10 do his job or her job and then go to GPL and have a
11 finished, polished, published document, so to speak.

12 So what Tom has suggested, in
13 essence, gives members of the staff and myself,
14 those people who are writing and editing, another
15 week and it obviously gives this subcommittee time
16 to look at it as well. I don't know quite candidly
17 how long it will take. There is -- as a very basic
18 estimate, I would think there would be at least ten
19 business days or more involved in writing this,
20 which puts us into delivering that draft to the
21 subcommittee on Christmas Eve or doggone close.

22 If -- again, if the Commission
23 is open to giving the writing group another week,
24 I think that certainly would be appreciated.

1 MS. COOPER: Go ahead, Ted.

2 MR. LELAND: Okay. Let's hear more
3 thoughts on the proposal as we move from the 7th or
4 8th to the -- I guess it would be the 14th or 15th.

5 DR. SIMON: Oh, I hope the 15th. I'll
6 be returning late the 14th.

7 MR. SPANIER: The other problem for
8 me, and maybe others, is that I had that date on my
9 calendar and every other day of the month is now
10 booked. I mean, it's -- to get to the meeting
11 yesterday, I had to cancel a whole day's worth of
12 meetings and I can't tell you how many people are
13 angry about that. I'd hate to have to do that a
14 second time. So just changing schedules is
15 difficult.

16 MS. GROTH: Ted and Cynthia, if we
17 go with the current schedule and if the staff cannot
18 get the draft report to the committee until
19 Christmas Eve or Christmas Day, around that time,
20 and we're meeting on the 8th, I don't know if we
21 will have enough time to receive the report or if
22 there is enough time for us to get the report in a
23 timely fashion, read it and be able to respond in
24 some fashion.

1 So I think the time line is
2 awfully tight. I was going to make a suggestion
3 later today that we -- the commissioners receive
4 the draft, like, by the 20th of December, but
5 obviously that's impossible.

6 MR. LELAND: What you are saying
7 in effect is if it does take us until Christmas or
8 Christmas Eve to do that and then we meet on January
9 7th and vacations and all that other stuff that's in
10 there, it's difficult for us to get our work done,
11 right, for us to get timely enough notice of --

12 MS. GROTH: If you get the -- if the
13 committee does not get the report until the 25th
14 and then they need to take a look at it, massage it,
15 do whatever they are responsible for doing, then,
16 the commissioners won't have an opportunity to
17 review the report.

18 MR. LELAND: So you would rather have
19 the 14th or 15th?

20 MS. GROTH: I would rather have it
21 later so we have an opportunity to -- at least, you
22 know, a week or ten days before the meeting for us
23 to read the report and be able to react to it.

24 MR. LELAND: Percy?

1 MR. BATES: Is the plan, though, to
2 have the draft to all of the commissioners prior to
3 the 8th or whatever the date is? Is that what --
4 Debbie?

5 MS. PRICE: Best case scenario, that's
6 my desire to be, yes, that we do the drafting, so
7 to speak, a draft of the draft, get that to the
8 subcommittee who is reviewing it, get that document
9 then to all the commissioners in a day or two
10 hopefully, too, before we meet for our next meeting
11 so you actually have a chance to read through it
12 before you see it for the first time. If we can get
13 it before a day or two, great. That would -- that
14 would be -- that's my focus and my desire right now.

15 MR. BATES: Okay.

16 MS. GROTH: Debbie, I think a day or
17 two is -- we need much more time and I know we're
18 looking at a strict time line, but what we're doing
19 here is so important and to just have a day or two
20 to review the report and hit and miss on all of us
21 with our schedules, I think, is --

22 MS. PRICE: I understand.

23 MS. COOPER: Are you saying a day or
24 two before the 7th or 8th or are you saying a day or

1 two before -- if we were to move it back to the 14th
2 or 15th? Are you saying now we would have ten days?

3 MS. PRICE: I'm saying if we backed up
4 the meeting to the 14th or 15th, it would give the
5 staff and the subcommittee a day or two longer and
6 then it would also give us an opportunity to get it
7 to you possibly a couple days sooner. You know, I
8 mean, it just provides seven days of working --
9 seven working days you didn't have before. So
10 hopefully, you know, it could help out both arms of
11 that.

12 MR. LELAND: Okay. Well, the proposal
13 before us, then, it seems to me, is to move the
14 meeting to the 14th or 15th and get the -- a
15 commitment by staff to get us a draft of the report
16 thoroughly reviewed by our subcommittee a week in
17 advance because I agree with Cary, getting it a
18 couple days in advance and then all of a sudden
19 you're traveling and you never get it, it's a mess.

20 DR. SIMON: I was just going to say if
21 you're going to move it, I come back -- I know I'm
22 only one, but I do come back early in the evening on
23 the 14th. If we could possibly meet the 15th,
24 since you were moving it up, that would make an

1 enormous -- otherwise, I can't be here the 14th.

2 MR. LELAND: Well, I, for one, would
3 trade a later date for an earlier packet arrival so
4 I could review it than to have it rushed like it was
5 this time. I mean, we spent, you know, two hours
6 yesterday morning trying to find out what we were
7 trying to do because we had materials coming and
8 going and it would be much easier if we could do
9 that. So I'm comfortable postponing it until the
10 15th.

11 MR. BATES: You know, this -- we've
12 got to have everybody at that meeting and I think
13 we've got to try and figure out which date will
14 allow us to do that because I just don't think we
15 cannot have some of the members of the Commission
16 not there.

17 MS. COOPER: And, Julie, you were
18 saying the 14th is --

19 MS. FOUDY: I think that I --

20 MS. COOPER: Get the microphone.

21 MR. GRIFFITH: My proposal would be
22 let's do it the 15th, 16th or 17th; sometime around
23 the 15th or after.

24 MR. SPANIER: There are -- about half

1 the Commission is not at the table right now. I
2 think you are making a big mistake because we went
3 through all of everybody's schedule and came up --
4 back then, everybody knew what their calendar was
5 and we came up with a date that hit the most.

6 I personally reject the idea that
7 we will only or can only get the material to people
8 a day or two ahead of time. There is a professional
9 staff here who has a month to get the job done. Why
10 not get it done before Christmas and give the group
11 plenty of time to deal with it?

12 If this were taking place with my
13 staff, I would give them the deadline and tell them
14 when to get it done. I just think it makes no sense
15 to take a volunteer group of commissioners who have
16 established this on their schedule and have had it
17 on their schedule since July and change it at the
18 last minute because the staff can't have the
19 document we need a few days earlier.

20 Let the Commission give the staff
21 a deadline when we want to see the document.

22 MR. LELAND: Yeah. Graham, I think
23 the reason this got brought up is because a
24 commissioner can't make it on the 7th, isn't that

1 correct?

2 MR. SPANIER: Well, we've known that
3 from the beginning, but you're going to have at
4 least as many or more commissioners who can't make
5 it on the next date.

6 MR. LELAND: Yes, Debbie?

7 MS. PRICE: Graham, I really do
8 appreciate what you said and, you know, up until
9 just a few minutes ago, we had every intention of
10 getting the information in the documents to you all
11 in a timely manner prior to the 8th. You know,
12 we'll just -- we just have to work under time
13 constraints and be responsible to those time
14 constraints. So I agree, what you said is certainly
15 reasonable, and we'll work with that,
16 with whatever we have to do.

17 DR. SIMON: All right. But then when
18 does this subcommittee get the draft?

19 MS. COOPER: Can you guys answer that?

20 MR. DISKEY: The answer -- there is no
21 answer. There are a number of items we'll have to
22 look at on the transcript. There's a number of
23 statistics that are going to have to be pulled. I
24 mean, there is -- preliminary work has been done.

1 DR. SIMON: I appreciate that.

2 MR. DISKEY: I wish I had an answer.
3 We simply do not.

4 DR. SIMON: Because, well, you know,
5 I'm a minority. I would work on the 25th, but I
6 think most of you will not be working on the 25th
7 or 24th or 26th and so that gets very complicated,
8 it seems to me, as to when the committee has a
9 chance to work on it before -- the subcommittee --
10 before we send it out.

11 MR. LELAND: I mean, I -- let's --
12 it seems to me that we -- the only fair thing -- the
13 way to look at this -- not the only fair thing, but
14 a fair way to look at this is, we sort of have to
15 have a consensus that change is appropriate because
16 we've already committed our calendars. We already
17 said we could do it. Doesn't sound like we have a
18 consensus to move it a week later. Unless that
19 consensus develops, let's just leave it on the 8th
20 and we'll just work with staff to try to work with
21 the subcommittee on the dates and let's get it to
22 people as -- but I agree with Graham, we need to --
23 Debbie, I think we need to set a date where we're
24 going to get this thing that we can all count on.

1 MS. FOU DY: We can set that now
2 because that's -- I mean, that's the other thing
3 seeing as it's the holidays. I don't want to be
4 in a situation again where we have only one day to
5 look at it. I mean, is there --

6 MR. LELAND: Well, I'd love to get
7 them sent January 2nd. That would -- we're meeting
8 on Wednesday. Could we get it sent for Thursday
9 before? Is that -- was that our --

10 MR. DISKEY: Debbie, you're going to
11 have to answer this. I do not make assignments
12 throughout the staff.

13 MS. PRICE: Yes. So you're asking
14 for us to send out the document to you on the
15 Thursday before our Wednesday meeting, the 8th?

16 MR. LELAND: Yeah. That would be
17 Thursday, January 2nd.

18 MS. GROTH: Can we try to shoot for a
19 week -- one week before?

20 MR. LELAND: That puts it on January
21 1st. That's New Year's Day. The government is
22 closed.

23 MS. PRICE: Just realistically,
24 there are certain constraints. It will take us a

1 while to get the transcript back from the
2 transcriber and Jay and the different folks working
3 on drafting the -- writing the draft can be working
4 on some of that. Some of that will be contingent on
5 the transcript -- getting the transcript back.

6 All of this we will do as quickly
7 as possible. We will -- you know, then, we have to
8 give it to the four subcommittee folks who then
9 have the responsibility of getting it back to us in
10 a timely manner so we can process their changes.
11 I don't see any problem with that occurring and
12 getting -- you know, getting the document to you
13 January 2nd, but there are things that need to fall
14 into place that staff has no responsibility for.
15 Basically, the subcommittee has the responsibility
16 for that. So we will all work together to meet that
17 goal.

18 MR. LELAND: Well, why don't we -- why
19 don't we shoot for a January 2nd mailing or -- I
20 don't know what you call it -- sending it to us and
21 we will get notified by staff if there's a problem
22 with that date we'll -- Cynthia and I will argue
23 with them then.

24 MS. GROTH: I would like to recommend

1 that maybe we send it to our home addresses versus
2 school because some of the institutions mailing
3 services are delayed.

4 MS. PRICE: Realizing that some of you
5 will be on a Christmas break, you might -- exactly
6 that, Cary. If there is an address other than the
7 address we normally would send it to, send us that,
8 but hopefully, this will be able to be an e-mailed
9 document, which then we really wouldn't have a
10 problem. If it's on -- if it's in the computer as a
11 document, we can e-mail it to you and that's much
12 quicker. If we have to -- just to be certain, if
13 there is an address other than the address that we
14 normally send it to, if you would e-mail us that
15 right away so we have that in case we do have to
16 ship it, but hopefully it will be an e-mail
17 document.

18 DR. SIMON: Just in terms of details,
19 if this subcommittee gets the document, say, the
20 24th, each of us will look at it, make editorial
21 changes and then we have to be in touch -- the four
22 of us have to be in touch with each other and
23 I assume you want consensus among the four of us as
24 to what -- there's one document that gets back to

1 you from the four of us.

2 MR. LELAND: Right.

3 DR. SIMON: And you want that done
4 between the 24th and the 2nd?

5 MR. LELAND: The 2nd.

6 DR. SIMON: That's going to be hard.

7 MR. BATES: When do you leave, Rita?

8 DR. SIMON: I leave the 2nd.

9 MR. LELAND: Well, it seems to me
10 it doesn't have to be an all or -- I mean, we
11 specifically chose the people to be on the
12 subcommittee because of their interest and sometimes
13 their location. It doesn't seem to me that you have
14 to wait until the whole document is done before you
15 start working with these people. You could get
16 sections of it done and work it section-by-section.
17 I mean, we don't have to make this a lot harder than
18 it is.

19 We all edit documents all the
20 time. It doesn't have to be an all or nothing
21 thing. I don't -- I can't understand that we'd
22 have to wait that long to get anything done. The
23 format of this thing and a lot of decisions could
24 be worked through the subcommittee before the total

1 transcribed document is done and rewritten. I mean,
2 it just seems to me that that can happen.

3 So I'm comfortable with that
4 deadline and then I would just say to the staff
5 let's work with the subcommittee as much as you can.
6 A lot of the -- what you'll hear, I think, on the
7 8th is going to depend -- staff people, it's going
8 to depend on the quality of your interaction with
9 our subcommittee.

10 I think if our subcommittee has
11 thoroughly blessed a lot of this stuff -- a lot are
12 comfortable turning over a lot of this work to them
13 and so the meeting on the 8th will go a lot better
14 if -- if the subcommittee has not been used
15 effectively and efficiently, then, I think we will
16 have some problems. Yes?

17 MS. FOU DY: I have more process
18 questions. So if you get that to us on the 2nd
19 and the meeting is on the 8th, right, not the 7th?
20 It's the 8th? Then, that draft is close to final
21 and we're meeting together to make final --

22 MS. PRICE: To go over line by line --

23 MS. FOU DY: But is that a chance again
24 to offer revisions and so forth and so then there is

1 another round after January 8th where we have to
2 have the final then?

3 DR. SIMON: But we don't meet -- we
4 don't meet again as a group.

5 MS. PRICE: You don't meet again,
6 but --

7 MS. FOU DY: Right.

8 MS. PRICE: -- you're taking the edits
9 from the -- you read the document prior to the 8th.
10 You all will edit it on the 8th as we do the
11 walk-through.

12 MS. FOU DY: Right.

13 MS. PRICE: Then we will get that back
14 to all of you before we -- I mean, that then should
15 be what comes back with all of your -- after your
16 review of that, it should be close to the final
17 document we turn in on the 31st.

18 MS. FOU DY: Okay. And what is the --
19 the other process of -- we're offering findings
20 and then the recommendations and then with the
21 recommendations, what's the process behind that
22 with the vote?

23 MS. PRICE: Line by line.

24 MR. LELAND: The same as -- I assume

1 we're going to review them one by one and then --

2 MS. FOU DY: Right.

3 MR. LELAND: -- we will have some
4 type of either consensus, acknowledgment or vote or
5 something just like we --

6 MS. FOU DY: Are we -- are we going
7 to define that better? I mean, because I know
8 that there are different views on different
9 recommendations and we are going to have to come
10 to that somehow. How will we --

11 DR. SIMON: Julie, can you imagine a
12 minority report, for example? Is that --

13 MS. FOU DY: I don't know. I'm just
14 saying I don't know the process. I mean, because
15 there are different opinions, clearly, I --

16 MR. LELAND: I know. I think we are
17 assuming there's going to be some kind of vote.
18 It would be wonderful in the best of all worlds if
19 there was a consensus regarding the final draft and
20 the recommendations -- excuse me -- of the findings.
21 That would be a real step forward for us if we could
22 get a flat out consensus on that. I'm not sure we
23 can achieve that, but we ought to try.

24 I assume we're just going to go

1 through and vote on the recommendations after we're
2 done. I think that's the way it's going to work.
3 I would like to talk to Cynthia about it sort of in
4 private and figure out what she's -- what we're both
5 comfortable with and then present it to all you guys
6 in the start. You're thinking a little bit further
7 ahead than, I think, we've thought, but it's a good
8 question. It's an absolutely appropriate question.
9 I just don't know if we have the definite answer.

10 DR. SIMON: And by a vote, are we
11 talking a majority vote or two-thirds? I think
12 once Julie raises this, we have to -- we should
13 understand what the ground rules are.

14 MR. LELAND: Yes. I think you have
15 to --

16 MS. FOUDY: And I --

17 MR. LELAND: Go ahead.

18 MS. FOUDY: I mean, coming to that
19 process, I think, is important too. How -- you
20 know, we're not going to be together again until
21 January 8th when that's supposed to be almost a
22 final form. So how do we decide on that process
23 together is another issue that makes sense because
24 I think we would decide on a process together,

1 correct?

2 MR. LELAND: Yeah. I'm assuming that
3 Cynthia and I and the staff get together and sort
4 of -- once we see what this product looks like, get
5 an idea of how best to try to work with you guys and
6 then present that to you when we meet and we can
7 have a discussion as we have on other process
8 issues.

9 It seems that every time we've
10 met, we, as co-chairs, have sort of said this is how
11 we think it ought to work. We've either done it
12 that way or you guys have amended it and we've had a
13 consensus and away we went. So I'm assuming that's
14 the way it would go.

15 I mean, in other words, we'd
16 present to you guys, gee, here's what we think this
17 is going to look like. This is the way we'd like
18 to proceed during the next X-number of hours and
19 what do you think about it?

20 MS. FOUDY: So the vote wouldn't
21 happen until actually January 8th?

22 MR. LELAND: I'm assuming that.

23 MS. COOPER: Yes.

24 MS. GROTH: Ted and Cynthia, could

1 you -- and I wasn't at the second day of the San
2 Diego hearing so I apologize, but could you tell
3 me what the role is of the subcommittee and the
4 process when they receive the report?

5 Will Rita have certain members
6 of the Commission that she will call to discuss
7 the report? How does that work? Could you --

8 MR. LELAND: Well, I think what
9 happened was there was a concern when the staff
10 presented the ideas of how they were going to edit
11 and write this, that commissioners were concerned
12 that the staff not get too far down the road on any
13 particular issue or any particular editorial style
14 until the commissioners had it, you know, that we'd
15 be so far down the road that the Commission would
16 lose control of the process and maybe lose control
17 of the content.

18 So we said, well, we don't want to
19 have all 15 commissioners looking over these poor
20 individuals' shoulders so let's have a subcommittee
21 who are interested and maybe geographically located
22 in an area that they could help edit this thing on
23 an ongoing basis. That's why I said earlier I
24 didn't see this as them completing the project,

1 handing it over to the subcommittee and handing it
2 back. I saw it as more collaborative as we go
3 along.

4 Then when we met in January, we
5 would have assurances that there were commissioners
6 that had monitored the editing and the developing
7 process in a way that would make us more comfortable
8 with the process. We were all, I think, afraid at
9 the time that -- not that the staff was a bunch of
10 wild people who were going to go off and do it, but
11 I think there was a concern that, gosh, if this
12 is -- if our names are going to be on this, that we
13 ought to have some oversight as the thing -- as
14 we're now getting to crunch time and it's being
15 developed. That was the point.

16 MS. GROTH: And that makes sense.

17 MR. SPANIER: Did you say staff were
18 geographically located?

19 MR. LELAND: No. I said -- I said
20 that the committee was either particularly
21 interested in helping with the editing or were
22 geographically located in a way that might be
23 easier for them to help with the editing.

24 DR. SIMON: But we're -- but, in fact,

1 we're all over the country; Brigham Young, Michigan
2 and -- and where's Donna?

3 MR. GRIFFITH: We're all in America.

4 DR. SIMON: That's true.

5 MR. SPANIER: Well, I'm just thinking
6 if it's going to be done, really, electronically or
7 via conference call, couldn't we all get the draft
8 electronically and send the input in and within
9 about 48 hours, then, they have everybody's input?
10 You're talking about a time element and, I mean, I
11 think it would be great -- it's great that some of
12 our colleagues are willing to spend a couple extra
13 days doing that, but it's probably not really
14 necessary or efficient at this point if you have
15 good staff working on it.

16 MR. LELAND: Well, that's different
17 than what we decided last time. I think -- I don't
18 see any reason why we couldn't change direction.
19 We could disband our subcommittee and make it the
20 committee of the whole. I don't -- I don't have a
21 particular pride of authorship in the idea. It came
22 from a commissioner.

23 MS. GROTH: My suggestion was going to
24 be when the draft -- it's similar to Graham's. When

1 the draft went to the subcommittee, that we all got
2 copied as well and I had thought I heard Rita, and
3 correct me if I'm wrong, saying that the
4 subcommittee would then make phone calls to various
5 commissioners to get feedback.

6 So I just -- if that's the way
7 it's going to work or if that was the plan, then,
8 perhaps we would have the report at the same time
9 they do to read. Did I misunderstand?

10 MR. BATES: No. I thought there were
11 calls between the members of the subcommittee.

12 MR. LELAND: And I thought that we
13 would -- my impression was we would have a
14 conference call or something between the
15 commissioners. I think the problem is -- is that
16 what commissioners were concerned about, if I'm not
17 mistaken, this was not my concern, but commissioners
18 were concerned that once a draft is presented, it
19 takes a life of its own and what you're suggesting,
20 if we make this the committee as the whole, this
21 draft will appear and probably appear in public and
22 it will take a life of its own and we'll have to
23 then respond to this certain vehicle.

24 I think the idea was let's

1 have a committee of commissioners watch this vehicle
2 be developed so it's not just presented to us as
3 something we must respond to similar to the way
4 people were concerned about the way different things
5 were presented the other day. Gee, I've presented
6 this and now I have to respond to it.

7 So the idea was let's not get
8 presented with anything unless the commissioners
9 have a chance to watch the process unfold and
10 monitor it. So we said we all don't want to do
11 that. Now, we're saying -- suggestion has been
12 made, which is a very reasonable one, why doesn't
13 everybody become -- sort of monitor that process.
14 If I were writing this thing, I would prefer having
15 four people, not 15, as my boss.

16 MR. JONES: Ted, there is a concern
17 that I have about the conference call -- he's
18 nodding his head. I think he knows -- Graham's
19 nodding his head. I think you know where I'm going
20 with this and that is the Federal Advisory Committee
21 Act. You know, our meetings have to be open to the
22 public. We can't have a committee meeting -- a
23 Commission meeting by conference call where the
24 public is not invited to attend.

1 MR. LELAND: We can't have a
2 subcommittee either, huh?

3 MR. JONES: Well, I -- I mean, you
4 know, there are -- obviously, you can have
5 individual communications from an individual
6 commissioner to the staff and that sort of thing,
7 but I just think I'd want to be very careful about
8 how we did that kind of thing because I don't want
9 to have us in a position where there is some sort
10 of, you know, the official, sort of substantive
11 discussion that's going on amongst commissioners
12 that the public doesn't have access to.

13 MR. LELAND: Well, you may have
14 answered our question, then, because if four members
15 of the Commission cannot get on the phone with the
16 people that are writing this and discuss it, then,
17 we don't need our committee, right?

18 MR. JONES: Right. In some ways,
19 right. It would depend on what the content of that
20 discussion is. I think it's -- we would probably
21 defend it better if it were a smaller group that
22 were -- that was interacting with, you know, the
23 staff. Again, I just don't want us to be in a
24 position where this is a -- you know, the Commission

1 is functioning by conference call.

2 MR. LELAND: Okay. So you're arguing
3 against what Graham suggested, which is we all do it
4 together --

5 MR. JONES: I think I am arguing
6 against what Graham suggested if, in fact, you were
7 suggesting a committee of a whole conference.

8 MR. SPANIER: Oh, absolutely not. No,
9 I think that's completely unworkable. It's even
10 more unworkable than having four people try to -- I
11 think give us a draft, let us -- give us 48 hours to
12 work it over, send back the whole thing. If it's
13 still too complicated, do another iteration and then
14 you know what everybody thinks and we work towards a
15 conclusion.

16 MR. JONES: I guess my understanding
17 of what we had talked about in San Diego is that we
18 would have these commissioners who had sort of
19 agreed that they would sort of be checking in with
20 the staff and looking over what was going on just to
21 make sure that we weren't veering off the tracks --
22 that the staff wasn't veering off the tracks in
23 terms of content, style, et cetera.

24 MR. SPANIER: Right.

1 MR. JONES: And, you know, that
2 strikes me as quite different from having a, you
3 know, a real sort of substantive exchange on the
4 issues with a big group of commissioners, which I do
5 think, you know, gets us in trouble.

6 MR. SPANIER: I'd even be -- I would
7 be supportive of sharing it -- how many people are
8 on the subcommittee, four? Sharing the first
9 iteration with four of the people and giving them a
10 chance for feedback and then sharing it with the
11 rest of the group, but, you know, I say move it
12 along and give everybody a chance for input. I
13 don't think --

14 MR. LELAND: I think what you just
15 suggested is what the model was. It was that we'd
16 have a small group of people who would not act as a
17 committee of the whole, but would help edit this
18 thing so we weren't presented with a final -- I
19 mean, this was in an environment now where people
20 were -- commissioners were coming to Cynthia and I
21 and saying, gosh, you know, we need more input on
22 who is being invited.

23 We put our names in and all we're
24 doing is -- we come up with a fait accompli. So we

1 said, well, we don't want any more a fait accompli.
2 We don't want any more completed documents handed to
3 commissioners so let's let commissioners sort of
4 monitor this process, a subcommittee. I mean, so I
5 saw it operating exactly like Graham just said.

6 Now, we don't have to -- let's
7 decide what we're going to do because we have some
8 other business to take care of. I mean, if people
9 don't think that a subcommittee monitoring it is a
10 good idea, we'll just get a draft on January 2nd and
11 away we go. If we're fine with that, I'm fine with
12 that. It saves these people some work.

13 MS. GROTH: Ted, I think --

14 MR. GRIFFITH: I'm going to -- oh, I'm
15 sorry.

16 MS. GROTH: Well, I think it's a great
17 idea. I just was wondering what the process was
18 once the subcommittee got the report. So I might
19 have muddied it a little bit, but since I wasn't in
20 San Diego, I just want to know what happens next and
21 I guess the subcommittee -- you answered that the
22 subcommittee just works with the staff and then we
23 receive the draft electronically or however.

24 MR. LELAND: Tom?

1 MR. GRIFFITH: Sounds good to me. I
2 would have been heading in the wrong direction. I
3 want to back up to the date issue again. Graham,
4 you're right. I mean, there are settled
5 expectations about what our schedules are for
6 January and that makes it difficult, but I'm
7 convinced that if we had more time before the
8 January 8th meeting, that that January 8th meeting
9 would be a lot more productive.

10 If there's -- if there's a chance
11 for the subcommittee to do its work, if there's a
12 chance for the staff to get the report out to the
13 full commission, I just think that extra week will
14 pay off huge dividends. As it is, we just have
15 scheduled one day and I presume that the January 8th
16 schedule will go from, what, 9:00 in the morning
17 until 5:00 in the afternoon or something like that?
18 And that's it. That's our last chance to get to --

19 MR. LELAND: So you're arguing again
20 to move it back a week?

21 MR. GRIFFITH: Yeah. Last ditch
22 effort to move it back a week.

23 MR. LELAND: Okay.

24 MR. GRIFFITH: I don't see too many --

1 MR. LELAND: Well, let's first deal
2 with the issues. Are people comfortable with the
3 process of a subcommittee helping the staff and us
4 getting it in sort of a draft that's been somewhat
5 vetted through this subcommittee in sort of a way to
6 be determined -- in a way that meets the law so that
7 we don't violate the public disclosure requirements?
8 Are we comfortable with that now? Okay. Then
9 let's --

10 DR. SIMON: How do you do -- I mean,
11 are you looking at people's expressions or do you
12 want a show of hands or what are we doing here?

13 MR. GRIFFITH: Rita, microphone.

14 MR. LELAND: Well, in the past, Rita,
15 what I've been doing -- what Cynthia and I have been
16 doing is sort of look around and if nobody shakes
17 their head and say no, we -- are you -- are you
18 uncomfortable? Did you want to express --

19 DR. SIMON: No. I just want to be
20 sure because these are important issues. I just
21 want to be sure.

22 MR. SPANIER: I guess I'm quite
23 comfortable with that one proviso and that is that
24 the subcommittee understands that -- at least to

1 me -- would not wish to see the subcommittee amongst
2 themselves negotiate away things that we've already
3 agreed or a preponderance of us have indicated by
4 the look in our eyes that we would like to see
5 reflected in some way in the report.

6 MR. LELAND: And, Graham, I think --

7 MR. SPANIER: I don't think the
8 subcommittee should be empowered to negotiate out
9 differences of opinions.

10 MR. LELAND: No, absolutely not.

11 MR. SPANIER: If you're talking about
12 style or are all the topics on the table, you know,
13 is it all there, are we headed in the right
14 direction, that's fine.

15 MR. LELAND: I think that's what we're
16 talking about unless I'm mistaken.

17 MR. JONES: The kind of activity that
18 you're talking about that you don't want to see,
19 that's the kind of activity that I think this group
20 shouldn't be engaged in if the public is not there
21 to observe.

22 MR. LELAND: Okay.

23 MR. GRIFFITH: It's, I think, style.

24 MR. LELAND: That's better guidance

1 for our subcommittee and for the staff as they work
2 with them. We're talking about a style issue and a
3 putting-it-together issue. I think we can function
4 well there. I would encourage staff to sort of
5 connect with these people and let's get going and
6 let's not wait until the whole thing is done and
7 give it to them. That could back us up.

8 Maybe when part of it gets done,
9 you could work, you know, part to the whole instead
10 of having the whole thing. Is there anybody -- Tom
11 has again brought up the idea of --

12 MR. GRIFFITH: I'll pull that back.

13 MR. LELAND: Okay.

14 MR. SPANIER: Can I have just one
15 other possibility? My note -- and you can clarify
16 this right away, Debbie, but my notes from the
17 August meeting suggest that we had actually settled
18 on January 7th and not January 8th. I'm a little
19 confused about that.

20 MS. PRICE: I thought we had switched
21 from the -- we had come in with January 7th and
22 switched it to the 8th.

23 MR. SPANIER: I had the 7th and 8th.

24 DR. SIMON: I have the 8th down in my

1 book.

2 MR. LELAND: I had the 7th on mine,
3 but my perception is we changed it to the 8th at
4 some point in time.

5 MR. SPANIER: That was the case where
6 we actually started with the 8th and moved it to the
7 7th. I just think we need to clarify that because,
8 again, that has some scheduling implications for me.
9 Let's answer that question first and then I just
10 have one other suggestion.

11 MR. LELAND: I mean, right now, it's
12 on the 8th. Let's just say that's the official --

13 MS. PRICE: I had it originally on the
14 7th and we switched it to the 8th and we had this
15 meeting scheduled on, I think, the 5th and we moved
16 it to the 4th.

17 MR. SPANIER: So does everybody here
18 think it's on the 8th?

19 MR. SPANIER: Okay. Well, then, I'm
20 probably the one that's confused. If it's, indeed,
21 on the 8th, then, we feel that there was some
22 substantive working, reworking, editing, that needs
23 to be done, I'm wondering if we could identify a
24 subgroup.

1 It wouldn't have to be the same
2 subgroup, but a group who would be willing to come
3 in the afternoon of the 7th and have your word
4 processors geared up and your printers and do it at
5 the Department of Education office so that when we
6 start the meeting on the morning of the 8th, we're
7 really ready to start.

8 I mean, I would endeavor to try
9 to be helpful that way, maybe others wouldn't, if
10 there was still stuff that needed to be done. We
11 maybe wouldn't know that until the time got a little
12 closer. If it was sort of a working group to get
13 ready for that meeting, again, not that they are
14 negotiating anything, but --

15 MS. PRICE: No, that sounds like a
16 good reasonable suggestion.

17 MR. LELAND: Yes. I'd be willing to
18 do that myself. Anybody else who -- we'll just get
19 volunteers. Are we okay with the law doing that?

20 MS. PRICE: Yes.

21 MR. JONES: I'm sorry. To do what?

22 MS. PRICE: Regarding the FACA law, a
23 subcommittee can meet without having to meet in
24 public. The meeting of the whole, and our forum is

1 eight, cannot meet without the public being
2 available, but a subcommittee can meet, you know, a
3 small group of people can meet. If you --

4 MR. LELAND: So if five or six of us
5 were to come in on the afternoon of the 7th and
6 get -- sit down in the room and really try to do
7 another draft that could be printed that night, that
8 would be helpful?

9 MR. JONES: I would still -- I'll be
10 there, too, but I still think we need to be careful
11 about what -- you know, what we discuss and how it's
12 discussed.

13 MR. LELAND: Okay. Bring your billy
14 club.

15 Any other programs or issues
16 regarding the process and timing this stuff?

17 MS. GROTH: I have a point of
18 clarification. So we definitely will have the
19 report by January 2nd?

20 MR. LELAND: They will mail it the
21 morning of the 2nd.

22 MS. GROTH: Mail it the morning of the
23 2nd.

24 MS. PRICE: We'll get it out on the

1 2nd.

2 MS. GROTH: Probably electronically.

3 MR. LELAND: Yeah.

4 MS. PRICE: Hopefully, electronically.

5 MS. GROTH: Any earlier would be
6 appreciated.

7 MR. LELAND: Yes.

8 MS. PRICE: Absolutely.

9 MR. LELAND: The earlier, the better.

10 We're assuming the subcommittee has done some
11 cursory vetting of the thing. Okay?

12 MR. LELAND: We'll now start --
13 Cynthia and I thought we would go around and exhaust
14 the recommendations that people have that weren't
15 covered on the first.

16 Again, we have some people that
17 are part of our forum that have airplane flights, et
18 cetera. So let's make sure that we are as succinct
19 as we possibly can and let's not repeat what's
20 already been stated.

21 MS. COOPER: Okay. I'm going to be
22 quick. I think the Department of Education/OCR
23 should initiate programs to promote interest in
24 opportunities for female athletes at the high school

1 level. That was pretty -- it's not controversial.

2 MR. LELAND: Questions? Thoughts?

3 Hearing none, seeing none, I pass.

4 MR. DeFILIPPO: Pass.

5 MR. SPANIER: Pass.

6 MR. LELAND: Debbie, do you have
7 another recommendation that you would like to share
8 with the Commission and the world at large? Do you
9 want to think about it?

10 DR. YOW: Yes.

11 MR. LELAND: Okay. Cary?

12 MS. GROTH: Pass.

13 MR. LELAND: Percy?

14 MR. BATES: We may have already
15 covered this, but I guess the other one that I had
16 was the need for regional consistency from one
17 region to another. That is one that I think we need
18 to really nail down.

19 The other one that I had has to
20 do with the nationwide education program and I guess
21 we may have already covered this, but it seems to
22 me that there are different groups. There's the
23 colleges and universities, members of the NCAA and
24 the thing that I kept hearing, and I don't know how

1 we do this, but clearly, we've got to join hands
2 with the court somehow so that there is some flow
3 here because what we seem to have been hearing is
4 that what we may come up with, by the time you get
5 someplace else, there is a different way to do it.
6 While I know we are not in the business of educating
7 judges, there may be some sort of communication flow
8 that really talks about what the intent is and how
9 that comes out in relationship to the law. That's
10 all of mine.

11 MS. COOPER: Well, if you use Tom's
12 example or if you make it a regulation, I think that
13 would help.

14 MR. BATES: Yes. Okay. I mean, I
15 just think -- I just think when we heard -- when we
16 thought we were doing the right stuff that somebody
17 else said, no, and maybe we weren't talking enough.
18 That's all. That's it. Because I'm going to have
19 to leave first.

20 MS. COOPER: Do you want to go back to
21 Cary?

22 MR. LELAND: No. Let's keep going.
23 Just because we pass one time -- this is like poker.
24 You can play the second hand.

1 MR. BATES: Debbie is going to come
2 back. You can bet on that. She's not -- she's not
3 finished.

4 MR. LELAND: No, no. She's just
5 shuffling through her papers. Sally?

6 DR. SIMON: I --

7 MS. COOPER: Go ahead, Rita.

8 DR. SIMON: I just want to ask a
9 question of Cynthia. May I?

10 MS. COOPER: Yes.

11 DR. SIMON: When you say should
12 initiate programs at the high school level, do you
13 mean all high schools, every high school in the
14 United States?

15 MS. COOPER: Yes, absolutely.

16 DR. SIMON: Okay. And by initiate
17 programs, could you say something substantively?
18 What do you have in mind?

19 MS. COOPER: Well, I mean, there are
20 different programs that you could initiate --

21 DR. SIMON: Right.

22 MS. COOPER: -- that will help promote
23 interest on the grass roots level. I just don't
24 believe that -- while I believe that there are

1 some -- that there are some interests that are born
2 on the collegiate level, I just don't think that to
3 play varsity sports, that interest began on the
4 collegiate level. I think it begins at the high
5 school level.

6 DR. SIMON: I'm not disagreeing with
7 you, Cynthia. I just want you to elaborate.

8 MS. COOPER: Well, I just think that
9 the department needs to look into that. You look
10 into different problems all the time to promote
11 education and I think that you could look at
12 different programs. They could look at different
13 programs to help fund the high school level, create
14 more interest for females, even females who weren't
15 previously interested in sports.

16 DR. SIMON: Right. And would you
17 also include that they should make recommendations
18 about adding sports that aren't included in the
19 particular high schools?

20 MS. COOPER: Well, of course, if there
21 is an interest, absolutely.

22 DR. SIMON: So it's really quite an
23 elaborate proposal that you had. That's not bad. I
24 just want to understand what you are suggesting.

1 MS. COOPER: It's not controversial,
2 is it?

3 DR. SIMON: I'm not saying it's
4 controversial, but you're saying -- because there
5 are, you know, thousands and thousands of high
6 schools that OCR should look into, all of the
7 high schools in terms of interest, in terms of
8 participation, in terms of types of programs.
9 I'm not being critical. I just want to know.

10 MS. COOPER: Yes. And I believe
11 that there is an imbalance on the high school
12 level. We hear about athletes -- male athletes
13 who, on the high school level -- not even high
14 school level, K through 12, we hear how they dream
15 of playing professional basketball. Well, I would
16 like to hear about women, you know, programs that --
17 I would like to see programs developed so that we
18 will have women at age five dreaming of playing
19 professional soccer or professional softball, et
20 cetera, et cetera.

21 DR. SIMON: Okay. Well, thank you.

22 MR. LELAND: Any other questions?
23 Sally?

24 MS. STROUP: Pass.

1 MR. LELAND: Brian?

2 MR. JONES: Pass.

3 MR. LELAND: You guys passed last
4 time. Jerry?

5 MR. REYNOLDS: I thought that we
6 should consider -- we should reconsider our rules
7 regarding the private funding. The example that
8 comes to mind is Marquette.

9 In that instance, I believe,
10 the alumni offered up some money to fund the
11 program, but because of how the money had to be
12 allocated, the school decided that it wasn't enough
13 once you spread the money to both sexes. So I think
14 we may want to reconsider the standard that we use.

15 MR. LELAND: Okay. Does anyone want
16 to discuss that one? Cary?

17 MS. GROTH: So is your suggestion to
18 count donor dollars totally different? Don't --
19 that donor dollars would not be under the same
20 scrutiny as other dollars within the institution?

21 MR. REYNOLDS: No. I'm not being that
22 specific. I don't have anything in mind. It just
23 struck me as odd that in that case where it was
24 clear that the wrestlers at Marquette had the

1 interest and the ability to wrestle, that these
2 alumni stepped forward with a check that would endow
3 the program, but because how the Department of
4 Education -- because of our current rules, it was
5 not a viable option.

6 I mean, the fact that there was
7 money, that wasn't enough. It just strikes me
8 as -- it seems to me that we may be able to look at
9 how we decide how money has to be allocated and
10 maybe there are opportunities to tinker with it so
11 that if the situation arises and a team is about to
12 be cut, if someone steps forward, they could do it.

13 MR. LELAND: Donna de Varona has
14 talked a couple of times about this same sort of
15 proposal. Julie, do you have a comment here?

16 MS. FOU DY: I think that my comment is
17 that with Title IX, it doesn't seem to prohibit that
18 type of funding to a specific program. It's just
19 you have to balance it out or offset it, I think is
20 the word they use, in other areas of your programs.
21 I mean, the analogy would -- would -- if you don't
22 count it as part of your Title IX equation, the
23 analogy that comes to mind for me is it would be
24 like building a science lab and only white students

1 can use it.

2 I don't think you can take that
3 out of the equation, but I don't think you should --
4 and I think Title IX clearly doesn't prohibit them
5 from funding programs like this. It just has to be
6 offset somewhere else. I think that that needs to
7 be pointed out.

8 MR. LELAND: Okay. Graham?

9 MR. SPANIER: Well, I think -- I think
10 you are raising a good point and within the narrow
11 set of circumstances that you suggest, I would say
12 common sense would suggest, of course, it's relevant
13 and it should be considered.

14 I think in the larger scheme of
15 things, one has to be very careful heading down that
16 direction for reasons that Julie mentioned. There
17 certainly could be some mischief making and we
18 often -- I mean, in the current environment, we have
19 donors who step forward occasionally wanting to give
20 us money with certain strings attached and we have
21 to say no to them or talk them into changing the
22 strings because it would be straying into a gray
23 area or even crossing the line to designate that
24 funds can only be spent in certain ways or for

1 certain people.

2 So I guess, you know, the answer
3 is under certain narrowly defined circumstances, it
4 would absolutely make sense, but I think you have to
5 be very careful about it.

6 The other thing many of us
7 face, I think we heard in one of our presentations
8 about the University of Minnesota golfers. Of
9 course, the irony there was after they announced
10 they were closing down the men's golf team, they won
11 the national championship, but that's an aside.

12 But then people step forward and
13 say we'll put up the money and I'm not sure that
14 they actually wrote a check or not, but they claimed
15 that we were prepared to put up the money for three
16 years, or whatever, while the university solved a
17 financial problem.

18 We often have that issue as well
19 where donors step forward and give what appears to
20 be a generous gift to keep something going because
21 there is an emergency, but the university really has
22 to face up to the long-term financial commitment. I
23 think in those circumstances, you must look at that
24 long-term financial commitment in the context of

1 Title IX.

2 By accepting those funds, what
3 does it mean to the larger scheme of things. Didn't
4 Northern Illinois have something in this zone as
5 well or am I thinking about another institution?

6 MS. GROTH: Another institution.

7 MR. SPANIER: But there have been
8 several cases where donors have stepped forward to
9 come to the rescue, but upon closer examination, the
10 waters were a little muddy.

11 MR. LELAND: But you are just
12 suggesting an examination of the options and ways
13 that might be possible under certain circumstances?

14 MR. REYNOLDS: Right. There are
15 concerns. People will game the system. People are
16 gaming the system now. I'm not suggesting that I
17 have a particular plan in mind, just conceptually.
18 I think we should explore --

19 MR. SPANIER: Just a license to look
20 at it.

21 MR. REYNOLDS: Yeah.

22 MR. LELAND: Yeah.

23 MR. SPANIER: While Jerry has the mic,
24 could I just ask a question? I think it might be

1 helpful if our co-chairs would allow you to do this
2 for a minute, but what topics -- what areas or
3 recommendations are you hoping to receive guidance
4 on that we have missed in our one and two-thirds
5 rounds around the table?

6 Is there a topic or two that you
7 were hoping this Commission would come forward and
8 give guidance on and you have just been quiet over
9 there, I mean, today anyway, and we haven't gotten
10 there yet? You know, because this group is not
11 short of opinions. I think we would give them to
12 you if you were waiting for something.

13 MR. REYNOLDS: Prong two, when I look
14 at prong two, I see it has withered on the vine.
15 For many institutions, it's not a viable option and
16 that's because the prior AD didn't do the right
17 thing after Title IX was passed. I think that we
18 need to look at it differently.

19 In other cases, you had schools
20 that, after the passage of Title IX, did the right
21 things and they created a lot of teams for women and
22 just, okay, fine, they did the bulk of their work
23 and they -- in the late '70s and early '80s and so
24 for those schools, the room to grow is somewhat

1 limited. I think that the current approach that we
2 have in some cases penalizes teams that did the
3 right thing early on and it also ties the hands of
4 ADs who want to do the right thing today, but who
5 may be suffering from the effects of what a prior
6 AD has done.

7 So I think that we need to take
8 another look at prong two to see if we can reshape
9 it to take those concerns into account.

10 MR. LELAND: We already have one on
11 the books saying clarify prong two and prong three.
12 You are really talking about something different.

13 MR. REYNOLDS: One, two and three.

14 MR. LELAND: One, two and three.

15 Sorry.

16 MR. REYNOLDS: Well, no, I guess I
17 was just hoping for more discussion like with
18 respect to prong one, we drilled down and we had
19 detailed conversations. With respect to prong two,
20 basically it was we should clarify prong two without
21 much detailed conversation.

22 MR. LELAND: Would you like this to be
23 in the form of a recommendation?

24 MR. REYNOLDS: Yes.

1 MR. LELAND: Okay. And I think that
2 was the purpose of -- we're letting you do two in a
3 row. So you should feel good about that.

4 MS. COOPER: That's as loud as you
5 have spoken all along!

6 DR. YOW: Ted, can we talk about that
7 for a minute?

8 MR. LELAND: Yes, but let me just do
9 some housekeeping here.

10 I assume that with the first
11 suggestion that Jerry made in terms of suggesting
12 that we take a look at models of allowing private
13 funding to help with programs that may be dropped
14 and Julie had some comments about that. I'm
15 assuming that's going to go forward with the staff
16 to develop a proposal for us.

17 MS. GROTH: Yes.

18 MS. FOU DY: Can we ask some questions,
19 though, about --

20 MR. LELAND: Yes. Let's finish this
21 one. All I'm saying is let's finish this one so --
22 you want to add an amendment now?

23 MS. FOU DY: No, but to that one.

24 MS. GROTH: Yes, to that one, if Jerry

1 would allow me to do so. I think to allow private
2 funding for programs who are in danger of being
3 dropped as well as programs, for men or women, to
4 be added, I think we need to cover both sides there.

5 MR. REYNOLDS: That's agreeable.

6 MR. LELAND: Okay. Any other
7 questions or comments on the idea of the private
8 funding sort of being handled differently when
9 it relates to a program that is either being dropped
10 or one that we might -- someone might want to think
11 about starting? Any other comments on that one
12 before we move to the second?

13 All right. Hearing none, let's go
14 on to the second now. The reshaping of prong two,
15 let's discuss that now.

16 DR. YOW: I want to just say that --
17 use this as an opportunity, since Jerry brought it
18 up, that that's -- in review of the prong two, prong
19 two shouldn't exist. It does no one any good in a
20 terminal sense.

21 Prong two is used to get to prong
22 one. We have heard that over and over again, a
23 number of us around the table have experienced that.
24 Use prong two to get continuing expansion and it is

1 valuable in getting to proportionality, however that
2 is measured.

3 I understand the value of prong
4 three if you use surveys and you're going to make
5 a case that you don't need to be in proportionality
6 because you are meeting the interests of your
7 under-represented sex.

8 Jerry, it's just problematic, I
9 believe because what it is, you know, continuing
10 expansion every year, ever two years, every three
11 years, every eight years, every three years, as
12 long as the number that you added was at least 60
13 athletes and 20 scholarships.

14 I mean, that's another one of
15 those areas that is evaluated differently on a
16 case-by-case basis and I don't like that. I still
17 want to hit the target and I don't see how you hit
18 the target with that.

19 MR. REYNOLDS: Prong two, it seems
20 to me, is the prong most easily -- you can most
21 easily gain the system using prong one. If you
22 have -- if you are aware that there is interest
23 and abilities and you decide not to go ahead and
24 add that team because, well, I have added a team

1 two years ago, I can wait and hide out for four or
2 five years without doing anything despite the fact
3 that I have knowledge that there was interest,
4 ability and there are schools around where they
5 have other teams, where there's competition, so,
6 yeah.

7 But if we are going to keep prong
8 two, and, yes, there are some arguments to be made
9 that we shouldn't keep prong two, but if we're going
10 to keep it, I think that we should -- that it should
11 be made more robust so that people can use it. I
12 mean, either we get rid of it or we actually have
13 three -- if we stick to the three-prong structure,
14 and I'm not recommending that we do that, I'm not
15 making a recommendation for or against, but if we
16 wind up staying with the current structure and there
17 is a second prong, then, if we're going to hold our
18 nose and keep it, then, let's make it viable.

19 MR. LELAND: Debra, are you saying
20 drop it?

21 DR. YOW: I'm saying drop it from the
22 C.S. Lewis perspective when he says no clever
23 arrangement of rotten eggs will make a good omelet.
24 It's bad, guys. It's really bad. We need to drop

1 it.

2 MR. GRIFFITH: Debbie, the examples
3 that you cited of, you know, putting more
4 specificity to it, you know, the last three years,
5 20 scholarships, I take it that that was entirely
6 sarcastic, that none of those would be acceptable?
7 There is one approach you could do. You could say,
8 for example, look at the history for the last ten
9 years or last five years with, you know, adding a
10 certain amount of -- there are benchmarks you can
11 use, which I sort of took Gene to be getting at when
12 he said let's just clarify each one of them, but is
13 your feeling now that it really can't be salvaged,
14 that --

15 DR. YOW: I've watched it 30 years.
16 It's all over the board. It just depends on who --
17 to whom you are speaking as to whether or not what
18 you have done in expansion is considered to be
19 sufficient.

20 MR. LELAND: Yes, but I think we
21 already have a proposal to try to figure that out.

22 MR. GRIFFITH: To benchmark that,
23 yeah.

24 DR. YOW: I hear that. I'm making

1 another proposal that we consider dropping it.

2 MR. LELAND: Okay. When it's your
3 turn, you can do that.

4 DR. YOW: Because I don't think it can
5 be fixed. I'm sorry.

6 MR. SPANIER: Debbie's proposal is
7 much more fundamental and I really believe there is
8 some merit there. I think anybody who -- any school
9 30 years later is working on that prong, somebody
10 hasn't been minding the store. Now, it gets to
11 your issue should our predecessors be blamed or
12 should current people be blamed for something our
13 predecessors did, but I would think at the very
14 least, in a new set of regulations or clarification,
15 I don't know, you know, if it's permissible to do
16 something like this, but shouldn't it be about a
17 sunset provision that that prong -- okay. Here's a
18 new set of rules, everybody, and it's very clear so
19 nobody can argue they didn't know what the deal was.
20 Now, you know, and you've got five years -- you can
21 only use that prong for five years and after that,
22 you ought to be there and then you can't use that
23 anymore. Then you're going to have to demonstrate
24 it in one of the other ways.

1 MR. LELAND: Okay. Do you take either
2 dropping prong two or giving a sunset, are those
3 friendly amendments or do you want to keep yours on
4 the books and we'll wait until these guys --

5 MR. REYNOLDS: Well, with respect to
6 Debbie, I just suggest we add it as a recommendation
7 and ultimately, the commissioners would vote on it.

8 MR. LELAND: Well, when we get around
9 to her, we'll do that, But I'm talking about yours
10 right now.

11 MR. REYNOLDS: I don't see how we
12 could add Debbie's onto mine. You're asking me
13 to --

14 MR. LELAND: I'm asking you if you --
15 do you see what Graham Spainer said and what Debbie
16 Yow said as a friendly amendment to yours?

17 MR. REYNOLDS: With respect to
18 Graham's, yes.

19 MR. LELAND: Okay.

20 MR. REYNOLDS: With respect to
21 Debbie's, I --

22 MR. LELAND: No?

23 MR. REYNOLDS: -- don't see how that
24 could be considered friendly.

1 MR. LELAND: Okay. I'm just trying
2 to clear up where we are. I didn't think it was
3 very friendly either. I'm just kidding! Friendly
4 towards that.

5 Anything else on this proposal
6 to reshape prong two?

7 MS. FOU DY: The idea being behind
8 prong two is that it's the good faith effort of
9 getting there, right, because some schools
10 can't afford to immediately go straight to --

11 DR. YOW: Yes. That was the idea 30
12 years ago, yes.

13 MS. FOU DY: All right. So if a school
14 doesn't have the resources to immediately get to
15 compliance and they need time to get there, I mean,
16 the issue is are we going to, then, in fact, be
17 creating more lost opportunities for men because
18 they are just going to have to shave programs to get
19 there right away?

20 DR. YOW: Not with Graham's addition
21 to that.

22 MR. LELAND: Well, stick with Jerry's
23 proposal. The proposal to drop this is not on the
24 table right now.

1 DR. SIMON: All right. So tell me
2 again what is on the table?

3 MR. LELAND: His proposal is that we
4 reshape prong two, part of which might be adding a
5 sunset clause. Okay? So I think that's what he is
6 proposing. When Debbie -- when we get over to her,
7 she'll propose that we're going to drop it and I'm
8 sure we can -- okay.

9 Debbie, your proposal was to drop
10 it. That's what you said.

11 DR. YOW: Well, I know I did, but if
12 you are going to add Graham's comments to Jerry's,
13 it, in effect, is the same thing.

14 MR. LELAND: Well, I asked Jerry that
15 question and --

16 DR. YOW: Modify it, but it is.

17 MR. LELAND: I asked Jerry that
18 question and he said it wasn't. I mean, it's his
19 motion.

20 DR. YOW: Jerry, modifying and then
21 drop is the same thing as saying we're going to drop
22 it, but won't drop it until five years from now or
23 three years from now. It's the same thing.

24 MR. REYNOLDS: Yes, yes, yes. It's

1 been harmonized.

2 MR. LELAND: Debbie, are you
3 withdrawing that as your suggestion?

4 DR. YOW: Yes, I am.

5 MR. LELAND: Thank you. Anything
6 else? Anybody else have any comments on the idea of
7 reshaping and adding a sunset clause or suggesting
8 that the Department of Education consider reshaping
9 this? I think that's what we'll probably -- it will
10 look something like that.

11 Anything else? Since we just gave
12 Jerry two in a row, we'll go to Julie.

13 MS. FOU DY: We're hearing a lot of
14 talk of reshaping and rewriting and reformulating
15 and my recommendation speaks to that. In providing
16 technical assistance, the Department of Education
17 should not change current policies in ways that
18 would undermine the spirit and purpose of existing
19 interpretations.

20 MR. LELAND: Okay. Discussion?

21 DR. SIMON: Excuse me, excuse me. But
22 Julie, I think some of the discussion this morning
23 indicates that we may be reshaping some of the
24 traditional interpretations. For example, Debbie's

1 suggestion about defining substantial
2 proportionality as 50/50 and then having variances.
3 I think that's a different interpretation than the
4 one that is currently being used. I think some of
5 the things this morning that were -- gained support
6 or seemed to be on the verge of being adopted do
7 not -- is not consistent with the original
8 interpretation than the one that is currently being
9 used. I think some of the things this morning that
10 gained support or seemed to be are not consistent
11 with the original interpretation.

12 MS. FOU DY: The spirit, I'm talking
13 about. The spirit of Title IX.

14 DR. SIMON: By the spirit, you mean
15 equal opportunity?

16 MS. FOU DY: Yes.

17 DR. SIMON: All right. Okay. If
18 that's what you mean by the spirit of equal
19 opportunity, then, yes.

20 MR. LELAND: Okay. We also remember
21 we said that there were going to be times when
22 recommendations were going to be -- might be
23 conflicting. So I don't think that we should
24 just throw it out because it might be conflicting.

1 Questions of --

2 MS. FOU DY: And I'm not saying that
3 we can't provide guidance and that we can't educate.
4 I'm just saying that we shouldn't be changing the
5 spirit of the law in the process of doing that.

6 MR. LELAND: Yes?

7 MS. COOPER: Before we go on with
8 that, I want to skip and just ask Muffet -- Muffet,
9 are you there?

10 MS. McGRAW: Yes. I just had kind of
11 a quick comment and really I just want to make sure
12 that however we decide to work the proportionality
13 numbers with the student enrollment, whatever we
14 choose to do, I just hope it doesn't affect the
15 scholarship budget. I feel like how we are treated
16 and the kind of facilities we have is almost more
17 important to me than the participation numbers. I
18 want to make sure that doesn't get lost in what
19 we're doing.

20 The other comment, I didn't write
21 it down and I can't remember. Sorry.

22 MR. LELAND: Muffet?

23 MS. McGRAW: Yes.

24 MR. LELAND: This is Ted.

1 Are you suggesting that we put
2 in some kind of recommendation that says that the
3 support services and scholarship dollars available
4 for women, no matter what model we adopt or the
5 Department of Education adopts for implementation
6 of Title IX should not decrease? Something like
7 that?

8 MS. MCGRAW: Yes, that's it. And
9 the other one was that we just remember to look at
10 everything through high school, junior college,
11 NAIA, and every other level, not just the Division I
12 level.

13 MR. LELAND: Any questions of our
14 friend on the phone?

15 All right. Muffet, anything else
16 before you go?

17 MS. MCGRAW: No, that's it. I'm going
18 to hang up now.

19 MR. LELAND: Thank you.

20 MS. COOPER: Now, we'll go back to
21 Julie. Are we done?

22 MR. LELAND: I think we're done with
23 Julie's.

24 MS. FOU DY: I think Cary had something

1 to add.

2 MS. GROTH: I have a comment about
3 Julie's and maybe it's just going back to one of
4 the original statements I made in the beginning
5 this morning and that is we're making a lot of
6 recommendations. I, too, am making recommendations.
7 We just have to make sure that we understand the
8 current three prongs.

9 We're asking questions of Gerald
10 and Brian and before we make any changes, we all
11 should be very familiar with what the examples are
12 and the current rules and regulations or
13 interpretations are of those. I just want to remind
14 us of that.

15 MR. LELAND: All right.

16 MS. COOPER: Tom?

17 MR. LELAND: Tom, sir?

18 MR. GRIFFITH: Yes. I have one other
19 recommendation and that is I'd like to hear some
20 discussion at some point on this, but whether the
21 Department of Education should issue some guidance
22 that clarifies that eliminating teams is not the
23 preferred way to achieve compliance. Now, I don't
24 know exactly how you get at that, but there were

1 enough horror stories that we've heard and I know
2 there's a very real question about why an
3 administrator eliminates a team, whether it's
4 resource issues, Title IX issues and I don't know
5 quite how to get at that. Somewhere I'd like to
6 see us make the recommendation that that's not the
7 preferred way to go about compliance.

8 MR. LELAND: Okay. Rita?

9 DR. SIMON: I think what I'm about
10 to say -- first, I thought what I was going to say
11 was too specific, but it matches nicely with what
12 Tom is saying. I have been affected and very moved,
13 perhaps moved too much, by the testimonies that
14 we've heard at the various town hall meetings about
15 the dropping of wrestling teams and the gymnastic
16 programs. I think we should not ignore those sports
17 in our final report.

18 I'm not saying exactly what we
19 should do, but we heard some very eloquent testimony
20 on the part of both athletes and coaches and parents
21 and so on and I pick those two sports out because I
22 think they are the ones that people are most
23 concerned about. For us not to say anything about
24 them, I think, would be a mistake. I think that's a

1 key to, Tom, what you are proposing.

2 MR. GRIFFITH: I accept.

3 MR. LELAND: Other comments?

4 MR. GRIFFITH: I don't know exactly

5 how you do that.

6 DR. SIMON: Neither do I.

7 MR. GRIFFITH: And I need to think

8 through that more about how you give incentives to

9 universities that they not cut a program to get into

10 compliance.

11 DR. YOW: Tom, you are doing that

12 by -- if you start from that as your premise that

13 you don't want to eliminate teams, that's not the

14 preferred way, all these other ideas play into that

15 as related to private funding although I admit that

16 that -- we're trying to work that through in my mind

17 about how that would actually work.

18 I don't know if it can or not,

19 but certainly it's an admirable idea, but there

20 are several ideas around the table that would play

21 a part in better ensuring that that elimination

22 would not takeplace including the change in the

23 definition of substantial proportionality.

24 MR. GRIFFITH: Here's my anxiety

1 and maybe Graham could speak to this. I mean,
2 on the other hand, universities need to be free
3 to adjust their programs, right? Sometimes
4 universities need to make decisions to eliminate
5 sports.

6 How would that get affected by
7 a law or a policy by the Department of Education?
8 That is curious to me. That's what I need to
9 think through some more. We have a great staff
10 to help us phrase it in the way that what we get
11 at being in compliance with whatever -- however
12 Title IX has interpreted, you know, should look
13 askance at a university cutting to comply with that.

14 MR. LELAND: Okay. Julie?

15 MS. FOU DY: Wasn't there a proposal
16 out there or a recommendation that there be a
17 waiting period for schools to have to reevaluate
18 instead of -- do you recall hearing that
19 somewhere -- that there be a waiting period before
20 they dropped the program that they had to explain
21 why.

22 MR. LELAND: I thought there was a
23 proposal in Congress that was going to require
24 people to do that.

1 MS. FOU DY: A recommendation in one
2 of our reports? I don't know. You guys that are
3 familiar with that, would that help in terms of
4 having to --

5 MR. LELAND: I thought there was some
6 proposal in Congress.

7 MR. BATES: Senator Welsh said
8 something like that.

9 DR. YOW: It was there, but I could
10 not, as an athletic director, support further
11 government involvement in the university's
12 activities in athletics. I mean, we've never
13 dropped -- we haven't dropped a sport and don't
14 plan on dropping one so it's not pertinent to
15 our situation.

16 But in general, for ADs, we --
17 imagine trying to explain to people in Congress
18 why you're dropping a sport and who is going to --
19 who would make that -- why would we be doing that
20 with them? Are they going to have a committee or
21 something that tells us we can or can't? I mean,
22 how does that work?

23 MS. FOU DY: So are you saying that
24 having a waiting period wouldn't -- I mean, more

1 the nuance of having to be dictated by the
2 government or, I mean, would it still -- would
3 the fact still remain that it was actually to
4 save some programs?

5 DR. YOW: Yeah. I don't know, Julie.
6 It sounds like the EADA report -- the EADA report
7 and its lack of value to us. It's just that this
8 adds another burden on our shoulders.

9 MR. LELAND: Okay. Rita?

10 DR. SIMON: We went through four town
11 hall meetings and at those four town all meetings
12 we heard more about the dropping of gymnastics and
13 wrestling than any other sports. I think if somehow
14 that is not reflected in our report one way or
15 another, I think that the people who read the report
16 will say, were they deaf? Did they hear us?

17 MS. COOPER: I agree.

18 MR. LELAND: I think Tom's suggestion
19 here addresses it. We're maybe talking about
20 specifics, you know, how we can try to solve it.
21 Graham?

22 MR. SPANIER: Well, in light of all
23 the testimony that we heard, I think Tom's
24 sentiments are important and they reflect, you know,

1 a certain compassion, but I would agree with Debbie,
2 I just don't see how you can legislate delaying the
3 closure of the program. The -- it's very hard
4 sometimes to sort out the precise reasons.

5 We had people who stood up and
6 gave us testimony about their programs being
7 eliminated blaming it on one thing or another.
8 Many of us around the table know the real stories
9 and I don't think even -- I mean, in some of the
10 cases, and, you know, we heard one case where
11 people were quite sure it was about Title IX
12 where, to the best of my knowledge, it was about
13 infractions of wrongdoing within the program
14 and the school decided perhaps in light of their
15 Title IX and financial issues they were dealing
16 with anyway, now is the time to get rid of that
17 program, why resurrect a corrupt program, I'm
18 overstating it a little bit, when it will help
19 us with Title IX and compliances. But I think
20 that's what you are going to find in a lot of
21 programs. It's not just one clear thing. It's a
22 mix of things.

23 A point I made two hearings ago,
24 I think, in many of the program closures, it's

1 really a mix of financial exigency and Title IX.
2 If it were just Title IX -- I mean, if money
3 weren't an issue -- if money weren't an issue,
4 we wouldn't be here today because we would all
5 just go out and start lots of new women's programs,
6 support them at the fullest level and we all could
7 just double our athletic budgets, we wouldn't be
8 having this discussion because we could do
9 everything we wanted to do. So it's about a mix of
10 things.

11 Therefore, if a -- I think -- what
12 happened to the Iowa AD? He's gone. As he pointed
13 out earlier this morning the last -- the decision
14 of last resort is closing a program. By the time
15 the school has made the decision to close its men's
16 program, they are going to do it and it's a
17 combination of reasons. I don't -- to try to stop
18 them from doing it just exacerbates all of their
19 problems. So I hope we can find a way to show some
20 sensitivity to this issue without getting the
21 government regulating program closures.

22 MR. GRIFFITH: And I agree. That's
23 why I added at the end I wouldn't want to do this
24 in a way that unduly restricts university

1 administrators.

2 MR. SPANIER: Right.

3 MR. GRIFFITH: And maybe the only way
4 you can do it is to identify that you can't do it
5 and you shouldn't do it simply for compliance with
6 Title IX. Maybe that describes a null set, but it
7 might describe some out there, and I think it would
8 be valuable to have the Department of Education
9 weigh in with that set of values, that, you know,
10 we're not interested in you getting to compliance
11 by cutting sports. If you have legitimate reasons
12 to cut sports, that's --

13 MR. SPANIER: Or offer it as a
14 recommendation of at least saying that the
15 Commission recommends that the Department of
16 Education not routinely use in its negotiations
17 the closure of men's programs to accomplish the
18 goal of Title IX or something like that.

19 MR. GRIFFITH: Absolutely, something
20 like that. That would be one way to get at it.

21 MR. LELAND: Would you see that as
22 a friendly addition to it?

23 MR. GRIFFITH: Yes.

24 MR. LELAND: Okay. Other questions or

1 comments regarding this?

2 MR. DeFILIPPO: No. That makes good
3 sense. Ditto to that because, you know, I take
4 this back to college campuses. Many of our campuses
5 drop this particular major and add that major
6 because in time, it makes more sense for that
7 institution, yet the emotion of sports is such
8 that we're talking about asking Congress if an
9 institution can drop a sport. I don't think that
10 makes sense.

11 MR. LELAND: Cary?

12 MS. GROTH: It is in the 1996
13 clarification letter that OCR does not promote
14 that dropping of men's sports to achieve Title IX.
15 However, I think if we go back to one of Graham's
16 recommendations to eliminate the safe harbor
17 concept, the idea that it's only prong one, and
18 educate people that there are two other prongs, I
19 think it will be helpful if we get to that point
20 because the majority of the people who spoke about
21 the elimination of their programs, the unfortunate
22 elimination of their programs, they tied that into
23 proportionality, only prong one. So hopefully,
24 that will help.

1 MR. LELAND: Okay. Are there other --
2 Percy?

3 MR. BATES: Yeah. I think if I were
4 an athletic administrator, I might, I guess, view
5 this a little differently, but what I'm sort of
6 concerned about and what I thought we heard is
7 that in many instances, programs were closed for
8 budgetary reasons, but it was implied that it was
9 because of Title IX.

10 I don't know how we get at this,
11 but somehow, if we could do something that would
12 blunt that just a little bit so that if there are
13 really budgetary reasons, that's what we ought to
14 say. I mean, it has nothing to do with I wouldn't
15 do this if it were not for Title IX and so they go
16 off in saying it was Title IX that did it.

17 I guess I'm more interested in
18 trying to get something to blunt that somehow so
19 that we can get around that and maybe we can't, but
20 I think we heard a lot of that where some people
21 felt that that was erroneous and that there were
22 other reasons and that we ought to fess up a little
23 bit rather than having people go away saying then
24 I'll go and point the finger at somebody else.

1 MR. LELAND: Okay. Rita?

2 DR. SIMON: All right. And that,
3 you see, is what I'm concerned about in what form
4 this final report is going to take because I think
5 we have to have sections in which we talk about
6 what we have learned at the town hall meetings and
7 which we say, yes, we've heard you and -- in which
8 we can -- without writing something in stone,
9 indicate our awareness if the confusion about why
10 some programs were dropped and how that has been
11 blamed on Title IX, we understand all of that, but
12 in the end, we recognize the importance of some of
13 these sports, particularly wrestling and gymnastics,
14 and somehow the report has to be a literate enough
15 document that we can have discussions about these
16 issues without saying Congress must do this or OCR
17 must do this. There has to be some indication that
18 the town hall meetings were worthwhile and we picked
19 up the concerns and the worries.

20 MR. LELAND: That's right. Brian and
21 then Julie.

22 MR. JONES: Okay. I just want to back
23 up just for a second to address Percy's point. You
24 get back to something that we talked about a little

1 bit yesterday that Bob raised and that I talked
2 about too. I think your effort to sort of blunt
3 the perception that, you know, cutting teams is the
4 result of Title IX and instead it was budgetary
5 reasons, you know, runs into the problem that they
6 are not distinct things.

7 I mean, again, I put on the record
8 once again and Bob made that point yesterday that
9 sometimes you've got a situation where you've got to
10 shave a couple hundred thousand dollars out of your
11 budget so you need to eliminate a program. Well, at
12 the same time you're doing that, you're mindful of
13 your numbers for the Title IX compliance purpose.
14 So where do you look when you've got to make that
15 cut for the sake of the budget?

16 Well, we look on the male side
17 of the ledger in order to preserve, you know, the
18 right balance. So I do think it's a little bit
19 complicated at times. I mean, I'm sure sometimes
20 it's a straightforward budget decision that's got
21 nothing to do with Title IX or sometimes vice-versa,
22 but my suspicion is, just based upon what I've been
23 hearing in public meetings, is that more often than
24 not, it's sort of a -- it's a mixture of the two.

1 MR. BATES: I'm just wishing for a
2 little bit. That's all.

3 MR. LELAND: Yeah, but I do -- I do
4 think we've heard a lot of people who testified
5 for us who blamed it on one thing and that's Title
6 IX. I think most of us would say that that's --
7 I don't -- scapegoating is too hard of a word
8 maybe, but it certainly has been sort of the
9 thing everybody blames it on. It became an easy
10 target. Oh, gosh. I love you. I would love
11 to do everything for you. You're a great athlete
12 and loved everything, but it's those women.

13 I think that's caused a lot
14 of damage to a lot of people and I think whatever
15 we can say in a literate way, Rita, that brings
16 that out, I'd really support because I think we
17 need to get that -- the word out that we heard
18 when people said -- and we're also smart enough
19 to see through some of the -- I don't think
20 people were fibbing to us clearly, but I think
21 that it's much more complicated than just,
22 gee, we dropped your sport because women want
23 something and we can't give it to you.

24 So, Tom, are we okay on yours?

1 MR. GRIFFITH: Yes.

2 MR. LELAND: Rita?

3 DR. SIMON: Okay. I just want to
4 be sure that the tone of our -- the overall tone
5 of our report says we strongly -- we strongly
6 believe in equal opportunity.

7 MR. LELAND: Yes.

8 DR. SIMON: And I think that's
9 very important and that -- and I'm using again,
10 to quote Tom Sowell, it's equal opportunity.
11 We're not necessarily concerned about the equal
12 results. That has to come as a function of
13 interest and participation and a lot of other
14 factors, but equal opportunity, I think, is very
15 important and consistent with the earliest civil
16 rights legislation.

17 MR. LELAND: Okay. Anybody want to
18 disagree with that? Any comments? Okay.

19 MS. COOPER: I'll pass.

20 MR. DeFILIPPO: I'll pass.

21 MR. SPANIER: I'm just not sure
22 whether we have done this already so let me just
23 ask the question and if we feel it's been taken
24 care of, then, fine.

1 MR. LELAND: Okay. Go head.

2 MR. SPANIER: Let me just put it in
3 the form of a question that I wrote. Should it be
4 an option -- this is in relation to the measurement
5 of interest and abilities, getting back to that --
6 that prong. Should it be an option to measure
7 interest and abilities against regional, state or
8 national youth or high school participation or
9 against surveys of prospective students or admitted
10 students or enrolled students?

11 In other words, should prong three
12 be redefined to allow for measurement against more
13 appropriate populations?

14 We sort of had an in-depth
15 discussion of traditional students, non-traditional
16 in relation to prong one. In terms of getting to
17 interest and abilities, in terms of providing
18 scholarships or participation opportunities, are
19 we doing -- for those who are doing surveys, are
20 they doing the right surveys and do we need
21 a recommendation on the specifics of those kinds
22 of questions.

23 Are colleges and universities --
24 I mean, we've got junior colleges, community

1 colleges, Division I, Division II, Division III,
2 and there are striking differences among
3 institutions where their students come from.
4 Some schools, virtually all of their students
5 come from within a commuting radius. At other
6 institutions, 80, 90, 90 some percent of their
7 students are from within the state.

8 Now, that's also true at some
9 institutions where maybe the majority of their
10 athletes are from out of state. So there are
11 a lot of different variations on this question,
12 but it all kind of boils down to what extent
13 do we want to want to encourage not only to
14 allow for some flexibility, but to encourage
15 some serious thinking about what are the
16 appropriate populations to sample when one is
17 studying the question of interest and ability?

18 MR. LELAND: Let me respond first.
19 I thought we got some information back on the
20 LSU case about did they use some regional
21 competition and regional high schools and that
22 was sort of the database Debbie Corum said
23 that they already had to use, it seemed to me.
24 That wasn't national data. That had to do with

1 students who enrolled at LSU, students from
2 Louisiana and competition available to those
3 students and competition available to students
4 at Louisiana State University, the five-state
5 area, we talked about.

6 MR. JONES: That's right. Remember,
7 they also used the -- they used the information
8 that they got from some national and regional
9 surveys to fashion the questions that they posed
10 in the survey of their enrolled students.

11 MR. SPANIER: Well, we heard some
12 testimony on it. We heard -- I think he was the
13 former athletic director maybe or the former legal
14 counsel at Brigham Young who indicated --

15 MR. GRIFFITH: Athletic director.

16 MR. SPANIER: -- that in their survey
17 of incoming freshman, they asked a battery of
18 questions and three of them were specifically
19 designed to assess interest and abilities and
20 there -- apparently there's a national survey
21 that many of us do where those questions are
22 invented and we talked about this a little bit
23 yesterday in relation to findings, but I'm just
24 not sure we put on the table that we should be

1 recommending something in this area.

2 I guess I would recommend
3 that it be an area of study is probably about all
4 I'm saying, to study the different ways in which --
5 it's to give guidance as to how you would -- if
6 that prong is going to be giving some increasing
7 level of emphasis, you need to put some meat on
8 it.

9 MR. LELAND: Okay. Questions and
10 thoughts about that? Seeing none, hearing none --

11 MR. BATES: There is support for that.

12 MR. LELAND: Oh, I think there's
13 support for that. So we'll go ahead with that as a
14 potential recommendation. Debbie?

15 DR. YOW: Only -- just a comment about
16 what we've been talking about and that is Julie
17 referenced the spirit of Title IX and I agree with
18 that, Julie. We need to be sure what we are doing
19 is going to help, not hurt, everybody.

20 I just want to say again that I
21 really support the Jerry/Graham recommendation of,
22 as I understand it, modifying, but eventually
23 eliminating through the sunset clause prong two.

24 The reason I do, Cary, is

1 because people have used it as the crutch. Why do
2 we think that's a good thing, that they just are --
3 they leave people languishing here on 30 years, 40
4 years, 50 years because they are just trying to
5 figure out how little they can do and get away with
6 it. That is all it comes down to. So let's go to
7 one of two very clear -- let's go to interest and
8 abilities and use the surveys that other people
9 know how to put together or use prong one with
10 variations, with changing it, modifying it, updating
11 it, however you want to refer to it, to make it more
12 clear when you hit the target and get rid of -- you
13 have two ways and get rid of the prong two thing
14 that's just used as an excuse for people to not go
15 ahead and take care of business. That's just a
16 comment.

17 MR. LELAND: So that's just an
18 exclamation point on Jerry's earlier --

19 DR. YOW: Support.

20 MR. LELAND: Support. Okay. Cary?

21 MS. GROTH: Is this a commentary or --

22 MR. LELAND: No. I don't -- as long
23 as -- does anyone want to comment on that? I'd
24 rather move to recommendations if we can go through

1 those.

2 MS. GROTH: Debbie, as one of
3 your findings, did you say yesterday that NCAA
4 scholarship rules or regulations may be hampering
5 Title IX compliance or something like that, about
6 the scholarships?

7 DR. YOW: Uh-huh.

8 MS. GROTH: We'll I'd like to add a
9 recommendation going along with the --

10 MR. LELAND: We can't hear you.

11 MS. GROTH: Pardon me?

12 MR. LELAND: We cannot hear you.

13 MS. GROTH: You cannot hear me? Okay.
14 Here we go. Perhaps a review of the scholarship --
15 NCAA scholarship limitations would be a good action
16 item for a recommendation.

17 MR. LELAND: That's a suggestion to
18 the NCAA.

19 DR. YOW: Yes.

20 MS. GROTH: Yes.

21 MR. LELAND: Okay. Any other --

22 DR. YOW: I want to support, and I
23 know I'm not doing a recommendation, but it's okay
24 if I support it, right?

1 MR. LELAND: Yes. Especially if you
2 grab a mic before I have a chance to tell you not
3 too! I'm just kidding, Debbie.

4 DR. YOW: I've learned.

5 MR. LELAND: Gene?

6 MR. DeFILIPPO: There are two ways
7 to come at that too. Those of us that have 31
8 sports and more are not in favor of that. We're
9 in favor of adding additional women's sports
10 programs. Those who have, you know, ten, 11, 12,
11 you know, programs on each side, those institutions
12 would prefer more scholarships.

13 So it depends, on a lot of that,
14 what section of the country you are from. Do you
15 have a broad based sports program or not as wide
16 a broad based sports program? So there's two sides
17 to that issue as well.

18 MR. LELAND: Okay. Any other comments
19 on Cary's? We'll take that forward then. Percy?

20 MR. BATES: Pass.

21 MR. LELAND: Brian?

22 MR. JONES: Pass.

23 MR. LELAND: Jerry?

24 MR. REYNOLDS: Pass.

1 MR. LELAND: This is one of those
2 things if you pass all the way around one time,
3 we're done. Yes, Julie?

4 MS. FOU DY: I hate to go back to this
5 issue, but the walk-on issue, have we made any
6 recommendations on that one?

7 DR. YOW: We made a recommendation
8 as it related to a possible -- a change in how
9 we describe prong one because it would be a
10 variance of seven percent that would allow wiggle
11 room --

12 MS. FOU DY: I knew, Debbie, you were
13 going to bring it back to that one.

14 DR. YOW: -- for walk-ons.

15 MS. FOU DY: The --

16 MR. SPANIER: And also Ted's
17 recommendation mixed several things together
18 including the walk-on --

19 MR. LELAND: Yeah.

20 MR. SPANIER: -- issue by defining
21 an appropriate minimum squad size for every sport
22 and then those beyond that number, maybe they
23 would -- walk-on isn't the right term anymore, but
24 that would not be in the formula with that

1 recommendation.

2 MR. LELAND: You're really talking
3 about squad caps.

4 MS. FOU DY: Well, I think I'm talking
5 more about, again, the educational issue and I think
6 when we are talking, we've talked consistently about
7 providing more assistance and guidance and all of
8 that. I think one of the ways we can do that is
9 somehow providing technical assistance.

10 I have here the Department of
11 Education should advise schools that walk-ons are
12 not limited for schools that are in compliance under
13 prong two or prong three of the three-part test and
14 to just reiterate that.

15 MR. LELAND: Okay.

16 MR. SPANIER: Say that again.

17 MS. FOU DY: Walk-ons are not limited
18 for schools. The DOE should advise schools that
19 walk-ons aren't limited for schools that are in
20 compliance under two or three, prongs two or three.

21 MR. LELAND: I think I know what
22 you're getting-- I mean, I -- you know, just
23 tell the schools, look, when schools stand up and
24 say we have to, Title IX is forcing us to limit the

1 size of this squad. The women are keeping the 25
2 men on the swimming team and all you extra guys who
3 want to be on it can't be on it and the reason is
4 because of Title IX, you want to have somebody that
5 says, well, you know, there are ways to interpret
6 Title IX that don't require that you do that?

7 MS. FOU DY: Right.

8 MR. LELAND: We don't have to kick
9 men off the men's team to meet Title IX under prongs
10 two and three?

11 DR. YOW: Except you do, but never
12 mind me.

13 MR. LELAND: What do you mean you do?

14 DR. YOW: I mean, you do. You do
15 have to do that. Those of us sitting around the
16 table have talked to our attorneys to ad nauseum.
17 I mean, we've made them ill talking about this.
18 Why can't I? Why can't I?

19 Many of us operate under the
20 premise and the understanding from our own
21 universities that we cannot do that. We cannot
22 just add key walk-ons on the wrestling team,
23 on the men's gymnastics team, on the football team,
24 et cetera, et cetera. I mean, I'm saying that's

1 the way it really is day-to-day for many of us.

2 MS. FOU DY: Well, I think --

3 MR. LELAND: So her point is well
4 taken then? We should -- we should make it clear
5 that you don't have to do that if you comply under
6 prongs two and three?

7 DR. YOW: Our attorneys will tell you
8 that they are very well-informed and they don't need
9 our advice.

10 MS. FOU DY: But let's -- let's get out
11 of your world, though. Let's go to other -- I mean,
12 Title IX isn't just Division I-A. Let's go to other
13 divisions where it may be a practical thing to look
14 at for these other schools that are complying. We
15 have seen with the -- I think it was the GAO study
16 said over 70 percent were compliant under two and
17 three, that this is something that perhaps they are
18 not educated about and that would be helpful to
19 other universities that aren't in your situation.

20 MR. SPANIER: I'm not -- I mean, in
21 plain language, are you saying let's exempt walk-ons
22 or are you saying don't anybody give us any guff
23 about this walk-on problem? I mean, it's --

24 MS. FOU DY: I'm trying to say that --

1 MR. SPANIER: It's not really a
2 recommendation, is it? Is it a recommendation
3 saying, okay, you folks, don't make any noise about
4 walk-ons because it doesn't apply to you or you've
5 solved your problem in another way or --

6 MS. FOU DY: No.

7 MR. SPANIER: -- are you saying --

8 MS. FOU DY: I'm trying to say that
9 there are probably schools out there that don't
10 realize that they could be keeping their walk-ons
11 if they are complying under different prongs and
12 that this may save walk-ons from being cut off of
13 rosters because they are not aware that they are
14 allowed to keep them.

15 I think that that's the issue
16 we've talked about a lot is the opportunity for
17 walk-ons to still compete and play and there may
18 be a situation here where schools aren't educated
19 about it and that they can keep them and maybe
20 they just don't know. I mean, we've talked a lot
21 about education and clarity and it being an issue
22 and here's another way that maybe we can keep
23 walk-ons.

24 MR. SPANIER: I see.

1 MR. LELAND: I disagree with what
2 Debbie said. I mean, I think what if -- what
3 Debbie said in terms of you have to limit walk-ons,
4 her lawyers are telling her that, I think that's
5 only if you're trying to comply under some kind of
6 proportionality rule, which you told us earlier
7 your lawyers have told you that you can only do
8 proportionality and she is saying the opposite.

9 Her argument, which I sort of --
10 I can understand is under prong two and prong three,
11 you don't have -- necessarily have that walk-on
12 limitation issue hitting you in the face the way
13 it does when you are working under proportionality.

14 DR. YOW: And, Ted, if that's true,
15 I just wonder where all of those people are who
16 could have, should have testified to us in one of
17 those four town hall meetings that life is good.
18 I'm under two. I'm under three. All is well. I
19 can have as many men on these teams as we would
20 like to because I don't remember hearing that.

21 MR. JONES: Yes. And I -- let me
22 just, you know, strike a note for the lawyers
23 because I --

24 DR. YOW: I love our lawyers. They

1 are the best.

2 MR. JONES: No, because I can sort of
3 envision -- just being in a general counsel function
4 myself, I can see why, you know, a lawyer would
5 likely give an institution that kind of advice.
6 Part of it goes back to this discussion of prong one
7 being the safe harbor. It's the only objective
8 test.

9 So while an institution may,
10 in fact, you know, be complying with prong two or
11 prong three, I think a lawyer would always know
12 that that's -- you know, that's a very subjective
13 thing. Again, your measurement of interest, all
14 of these kinds of things are going to shift from
15 year-to-year and so I would imagine that a lawyer's
16 eyes are never going to be far off of the safe
17 harbor provision.

18 So the practical advice, I think,
19 any good lawyer would give you is, yeah, sure, let's
20 continue to comply with prong two or prong three or
21 whatever it is that we're doing, but let's not let
22 our numbers get -- our proportionality numbers get
23 so off of whack that our compliance with prong one
24 is lost in any case because it is, afterall, the

1 safe harbor and it's the -- you know, again, it's
2 the most -- well, it's the least costly, I should
3 say, you know, approach for compliance and again,
4 it's the safe harbor.

5 So even if you're complying with
6 prongs two and three, and I think unless we deal
7 with the safe harbor question, I think a lawyer is
8 always going to have his or her eye on the numbers
9 and is always going to be, you know, arguing that
10 you need to pay attention, you need to be roster
11 managing because we don't want to get those numbers
12 too far out of whack.

13 MS. GROTH: Debbie, we heard from
14 Debbie Corum, but Northern Illinois University
15 meets Title IX through prong three after a
16 complaint. We went through five years of an
17 investigative process and qualified under prong
18 three and we are comfortable. It scares me about
19 the safe harbor, but we were told by region five
20 that we are in compliance with Title IX because
21 we meet prong three.

22 MR. LELAND: Did --

23 DR. YOW: And I just want to say that
24 I don't think we want to go through five-year

1 reviews and hope that it all works out.

2 MR. LELAND: No, but did they -- Cary,
3 did they tell you that you had to limit walk-ons?

4 MS. GROTH: No.

5 MR. LELAND: See, and I think that's
6 the point that Julie has made. It's a very simple
7 point. If you qualify under two and three, you
8 don't have to limit walk-ons. That's a very simple
9 assertion on her part. I think that's probably
10 correct and let's just at least put it in as a
11 recommendation.

12 Whether your lawyer tells you
13 that you have to be under one, you know, that's
14 all a different issue. The issue is there are
15 schools that qualify that comply under two and
16 three and they don't have to count walk-ons.
17 The walk-ons -- the capping isn't an issue for
18 them. I think it's clear that people don't know
19 that because of the discussion we just had.

20 So other recommendations? Tom,
21 do you have one?

22 MR. GRIFFITH: This is a
23 clarification. It's on the walk-on issue. Within
24 the proposals that have -- recommendations that have

1 been made about walk-ons thus far, does it include
2 the possibility of not counting walk-ons? Did any
3 of you -- is that part of yours, Ted?

4 MR. LELAND: Yeah. Mine would have a
5 system where you wouldn't have to --

6 MR. GRIFFITH: You wouldn't count --

7 MR. LELAND: -- you wouldn't have to
8 roster count is the way to say it. I thought there
9 was another one in here and I only have rough notes.
10 I thought someone else brought up the walk-on issue
11 and wanted us to -- but I don't remember. Okay.
12 Rita?

13 MR. GRIFFITH: I think -- I think that
14 proposal really ought to be in there somewhere or
15 dealt with somehow.

16 MR. LELAND: Anybody else have any
17 other proposals that they would like to put up as
18 recommendations?

19 MS. FOUDY: I have just one --

20 MR. LELAND: Julie?

21 MS. FOUDY: -- that we talked about
22 yesterday that I don't know if we said today, the
23 OCR sport stuff -- stuff -- defining definitions
24 and disseminating that information, another

1 educational tool, the sport methodology stuff.

2 MR. LELAND: Yeah. I think that's
3 non-controversial. We have all agreed that's a
4 problem that we've noticed and we need to make a
5 recommendation. Graham?

6 MR. SPANIER: Ted, I do want to answer
7 your question. This will be the last thing I will
8 say. If your proposal is adopted by the group, I
9 think that is a sensible and elegant mechanism for
10 dealing with the walk-on issue.

11 If we ended up not -- I think
12 we need some solution about walk-ons. If that
13 were not to be accepted, then, I would have
14 a couple of other approaches that I would want to
15 get on the table, but I haven't done that because
16 that sounded as good as any I could have dreamed
17 up.

18 So I just want to say that I think
19 we've got to face up to that issue and deal with it.
20 If we ended up abandoning that, I would urge us to
21 come up with some other variation. So you said
22 there has been no other proposals put on the table
23 or recommendations relating to walk-ons, I think
24 it's only because you had the word on that and it

1 sounded reasonable enough.

2 MR. LELAND: Okay.

3 MR. SPANIER: I don't think we should
4 diminish the importance of that issue to --

5 MR. LELAND: I agree.

6 MR. SPANIER: -- so many people
7 by virtue of the fact we didn't get anymore
8 recommendations about it.

9 MS. GROTH: I know it was not a
10 recommendation, but in looking at prongs two and
11 three, at least what Julie has just said is does
12 accommodate walk-ons. I know it's not a new
13 recommendation. Its within the existing policies,
14 but I think that's an option as well.

15 MR. SPANIER: I think a lot of
16 people would feel some sense of relief between
17 your recommendation and what we've all kind of
18 revealed to ourselves now about the fact that
19 there is perhaps already and will be more
20 flexibility around the questions of proportionality
21 and safe harbor. I think as a package, it really
22 helps address the issues that are out there.

23 MR. LELAND: Well, are there any
24 other -- Julie, do you have a couple more

1 recommendations?

2 MS. FOU DY: Are we still on yours?

3 MR. LELAND: We're not on mine.

4 MS. FOU DY: On the model theory,
5 is that what we were talking about with Graham's?

6 MR. LELAND: Yeah. I think we're sort
7 of done with Graham's. I mean, what I'm debating in
8 my own mind is should we ask Graham to -- if there
9 is -- I mean, walk-ons is an important issue. We're
10 concerned about it. Probably the proper way to say
11 this is roster management, squad capping, as opposed
12 to walk-ons, and you avoid all the issues of who is
13 a walk-on and who is not a walk-on. But squad
14 capping and if we only have one proposal to define
15 that to help ourselves out of that unintended
16 consequence, how can -- should we listen to Graham
17 present his others? I'm inclined to think we
18 should.

19 MS. FOU DY: Yeah.

20 MR. SPANIER: Well, I don't
21 actually -- I mean, yesterday, what we handed out,
22 because I got the format wrong, was a list of
23 questions and you can infer from my questions what
24 some possible proposals would be, but I don't have

1 any written right now.

2 MR. LELAND: Okay. Okay.

3 MR. SPANIER: I mean, I could do that
4 and have them --

5 MR. LELAND: Well, then, could we --
6 would it be okay if we just asked Graham to get
7 those to the staff and we could write up -- because
8 I think we would be negligent when we've heard so
9 much impassioned testimony this squad capping that
10 many of us have felt required to do, that it would
11 be nice to have more than one or two proposals in
12 front of us to try to ameliorate that situation if
13 we could. I don't have a good one myself. Julie?

14 MS. FOU DY: I'm not opposed to
15 looking at this and putting proposals together and
16 trying to figure out a way to solve this, but my
17 concern with the model is that, again, we're under
18 the assumption that we're spending the same amount
19 of recruitment dollars on women and men and right
20 now, that's counting empty slots if you are having
21 an average per team and say you're not filling them
22 with the women's side and you're still counting them
23 as empty slots.

24 I think it's hard to jump from the

1 fact that women are only receiving 33 percent of the
2 budget on recruiting and then still count empty
3 slots as participation opportunities. That's a real
4 concern of mine.

5 MR. LELAND: I understand. It's not
6 that elegant as a whole.

7 THE COURT REPORTER: I'm sorry. I
8 couldn't hear you.

9 MR. LELAND: I said that my proposal
10 is not that elegant. There are some holes in it.

11 Other -- anybody else have
12 anything for the good of the cause here? Are we
13 ready to -- yes, Cary?

14 MS. GROTH: Regarding the walk-ons,
15 do we think that if we were to not count walk-ons
16 or to accept your proposal, that it would not
17 encourage programs to have those walk-ons versus
18 keeping men's Olympic sports?

19 In other words, do you think
20 that some schools would opt to keep walk-ons, men
21 participants, in lieu of -- particularly in men's
22 sports and we would see a continuation of some of
23 the Olympic men's programs being dropped because
24 schools opt to keep walk-ons instead?

1 MR. SPANIER: I think that's a
2 possible, but remote scenario. In many of the
3 men's Olympic sports we are talking about, their
4 actual -- they are on an equivalency scholarship
5 numbers and it's a pretty small number. I don't
6 know what the average squad size is in wrestling,
7 but without roster management at Division I-A
8 institutions, it would probably be 40 or so and
9 how many scholarships do they get in wrestling?

10 DR. YOW: Approximately ten.

11 MR. SPANIER: How many?

12 DR. YOW: Ten.

13 MR. SPANIER: Ten. So I mean, it's
14 about a quarter of a scholarship per person or less
15 on the average. I just don't see that happening.
16 Maybe some of your athletic directors would have
17 a better idea.

18 MR. LELAND: Yeah. I don't think
19 either model -- either the model we have now that
20 counts the number of participants as the students
21 on the squad list the first day of competition or
22 the one that John Parry and I are suggesting, which
23 is sort of a -- I don't think either one of those
24 encourages anyone to drop an Olympic sport and add

1 walk-ons to another team. I don't see that
2 encouragement. I don't see the numbers working that
3 way. I could be wrong.

4 Okay. Other comments and
5 thoughts? I guess we -- by the way, we did really
6 good work today.

7 MS. COOPER: Yes. Thank you.

8 MR. LELAND: I really believe we did
9 great especially this morning. So thank you, guys,
10 and we stand adjourned and I get to hit my little
11 gavel one last time.

12 MS. COOPER: Thanks!

13 (Whereupon, the proceedings in
14 the above-entitled cause were
15 adjourned, to be reconvened
16 on Wednesday, January 8,
17 2003, at 9:00 o'clock a.m.)

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1 STATE OF ILLINOIS)
) SS.
2 COUNTY OF C O O K)

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4 I, LORI ANN ASAUSKAS, a notary
5 public within and for the County of Cook and State
6 of Illinois, do hereby certify that heretofore,
7 to-wit, on the 4th day of December, A.D., 2002,
8 personally appeared before me at Marriott
9 Philadelphia, 1201 Market Street, in the City of
10 Philadelphia, State of Pennsylvania, The Secretary
11 of Education's Commission on Opportunity in
12 Athletics, Chicago Town Hall Meeting, called by the
13 United States Department of Education is a certain
14 cause now pending and undetermined before the
15 appointed Commission.

16 I further certify that the said
17 testimony was by me reduced to writing by means of
18 shorthand in the presence of said Commission and
19 afterwards transcribed upon a computer, and the
20 foregoing is a true and correct transcript of the
21 testimony so given as aforesaid.

22 I further certify that the taking
23 of the proceedings were pursuant to public notice,
24 and that there were present at the taking of the

1 proceedings were the aforementioned parties.

2 I further certify that I am not
3 counsel for nor in any way related to any of the
4 parties in these proceedings, nor am I in any way
5 interested in the outcome thereof.

6 In testimony whereof I have
7 hereunto set my hand and affixed my notarial seal
8 this 11th day of December, A.D., 2002.

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LORI ANN ASASKAS, CSR, RPR.
Notary Public, Cook County, IL
Illinois License No. 084-002890